Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1995

LAGUNA GATUNA, INC., A New Mexico Corporation,

Petitioner,

v.

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, JANE N. SAGINAW, Regional Administrator, Region VI of the Environmental Protection Agency, and the ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Whether the Due Process Clause is violated when an individual is placed in the "constitutionally intolerable position" of having to choose between either obeying an Environmental Protection Agency cease and desist order, thereby forgoing any possibility of judicial review, or violating that order and risking enormous and severe penalties, effectively cutting off all access to the courts?

2. Whether the total silence in Clean Water Act § 1319(a) as to the matter of judicial review and the absence of the "meaningful review" for jurisdictional claims under the Clean Water Act authorize the holding of the Tenth Circuit that judicial review is precluded under that statute, especially since, as this Court noted in *Abbott Laboratories v. Gardner*, "[t]he right of review is too important to be excluded on such slender and indeterminate evidence of legislative intent?"

3. Whether the holding of the Tenth Circuit, that a lawsuit challenging an Environmental Protection Agency CWA § 1319(a) cease and desist order constitutes "pre-enforcement review" and that no judicial review of such an order is permitted, is contrary to the holding of this Court in *Thunder Basin Coal v. Reich* since Laguna Gatuna has "no other means . . . to protect and enforce" its rights?

4. Whether the holding of the Tenth Circuit, that judicial review is not permitted of an Environmental Protection Agency cease and desist order that deprives Laguna Gatuna of property and liberty interests, is contrary to numerous holdings of this Court that federal

ISSUES PRESENTED – Continued

courts have the jurisdiction to review the constitutionality of such actions by federal agencies?

5. Whether the holding of the Tenth Circuit, that while Laguna Gatuna's "argument that it should not be necessary to violate an EPA order and risk civil and criminal penalties to obtain judicial review is well taken," such a result is not "constitutionally intolerable" since granting Laguna Gatuna judicial review "would undermine the EPA's regulatory authority," is contrary to numerous holdings of this Court as to the balance between Constitutional questions and matters of administrative convenience?

LIST OF PARTIES

Laguna Gatuna, Inc. (Laguna Gatuna) was Plaintiff in the United States District Court for the District of New Mexico and Appellant before the United States Court of Appeals for the Tenth Circuit. Laguna Gatuna is a corporation organized under the laws of the State of New Mexico. Laguna Gatuna has no parent or subsidiary corporations.

The following were Defendants in the United States District Court for the District of New Mexico and Appellees before the United States Court of Appeals for the Tenth Circuit: Carol M. Browner, in her official capacity as Administrator of the Environmental Protection Agency; Joe D. Winkle, in his official capacity as Acting Regional Administrator of Region VI of the Environmental Protection Agency (Mr. Winkle has since been replaced in his official capacity by Jane N. Saginaw); and the Environmental Protection Agency.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Review is sought of the as yet unpublished opinion of the United States Court of Appeals for the Tenth Circuit, dated June 20, 1995, appearing at pages App. 1 to App. 7 of the Appendix. The order of the District Court, dated April 8, 1994, also unpublished, appears at pages App. 8 to App. 9 of the Appendix.

JURISDICTION

Petitioner seeks review of the opinion and judgment issued by the United States Court of Appeals for the Tenth Circuit. The Supreme Court has jurisdiction to review this opinion pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution is at issue in this Petition for *Writ of Certiorari*. The Fifth Amendment provides in part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(App. 24.)

STATUTES INVOLVED

The statutes involved in this appeal are the Clean Water Act (CWA), 33 U.S.C. § 1311 *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. § 702 *et seq.* The specific provision of the CWA at issue in this case is found at 33 U.S.C. § 1319, and appears at pages App. 25 to App. 43 of the Appendix. The specific provision of the APA is 5 U.S.C. § 704, and appears at page App. 44 of the Appendix.

STATEMENT OF THE CASE

This case presents a challenge to an interpretation of the CWA that Laguna Gatuna may not challenge a finding by the Environmental Protection Agency (EPA) that property belonging to Laguna Gatuna is "waters of the United States," unless and until Laguna Gatuna violates EPA's "cease and desist order" thereby subjecting Laguna Gatuna to $25,000 a day fines, a $125,000 fine for "knowing" violations and jail time.

On June 24, 1994, Laguna Gatuna, Inc. (Laguna Gatuna) filed an action in the United States District Court for the District of New Mexico alleging that: (1) the EPA did not have jurisdiction over lands belonging to Laguna Gatuna regarding which the EPA had issued a "cease and desist order" since that property contains no "waters of the United States;" (2) Laguna Gatuna's procedural due process rights, as guaranteed by the Fifth Amendment, had been violated by EPA's "cease and desist order" since Laguna Gatuna was deprived of its liberty interests without due process; (3) Laguna Gatuna's procedural due process rights, as guaranteed by the Fifth Amendment, had been violated by EPA's "cease and desist order" since Laguna Gatuna was deprived of its property interests without due process; and (4) Laguna Gatuna's substantive due process rights, as guaranteed by the Fifth Amendment, had been violated by EPA's "cease and desist order."

On September 18, 1994, the United States filed a Motion to Dismiss the action, arguing that the District Court lacked subject matter jurisdiction. The United States asserted that: (1) there can be no challenges to "pre-enforcement decisions" made by the EPA; (2) the EPA had not taken "final" action that would provide

jurisdiction under the APA; (3) the United States had not waived its sovereign immunity to suits challenging "compliance orders" issued under the CWA; (4) Laguna Gatuna's claim that the EPA failed to observe the rulemaking procedures of the APA was without merit; and (5) Laguna Gatuna's Fifth Amendment rights to due process had not been violated by the EPA.[1]

On April 8, 1994, after a hearing on the motion to dismiss, the District Court issued an Order dismissing Laguna Gatuna's complaint.

On June 7, 1994, Laguna Gatuna filed a Notice of Appeal with the United States Court of Appeals for the Tenth Circuit. On May 18, 1995, oral arguments were held before the Court of Appeals. On June 20, 1995, the Court of Appeals issued an opinion holding:

> Laguna's policy argument that it should not be necessary to violate an EPA order and risk civil and criminal penalties to obtain judicial review is well taken. Nevertheless, following the reasoning of our sister circuits, we reject Laguna's conclusion such a situation is "constitutionally intolerable." Judicial review of every unenforced compliance order would undermine the EPA's regulatory authority.

(App. 7.) This Petition for *Writ* of *Certiorari* follows.

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[1] The United States declared that the EPA "need not engage in a prior adjudicatory process to issue such orders [as that issued against Laguna Gatuna]." (Appellee's Brief to the Tenth Circuit at 7.) Thus, there was no "prior adjudicatory process" before the cease and desist order was issued and there has been no "adjudicatory process" or judicial review since the order was issued.

STATEMENT OF FACTS

Laguna Gatuna is a New Mexico corporation, owned and operated by Larry Squires, a New Mexico rancher who lives in Hobbs, New Mexico. Laguna Gatuna's sole business is the disposal of waters produced in association with oil and gas operations in New Mexico. Laguna Gatuna disposed of those waters in a "sinkhole" – known as Laguna Gatuna – that consists of approximately 400 acres, a major portion of which is owned or controlled by Laguna Gatuna and is located near Hobbs, New Mexico.[2]

Despite its name, Laguna Gatuna is a "sinkhole," not a "playa lake."[3] Furthermore, the sinkhole is hydrologically isolated because no streams empty into it; no streams drain out of it; and there are no surface or groundwater connections between it and any other water body. Thus, the sinkhole cannot possibly be defined as "waters of the United States." (App. 11.)

In 1987, Laguna Gatuna requested a ruling from the EPA as to whether the sinkhole utilized by Laguna Gatuna constituted "waters of the United States" as defined by the CWA. The EPA responded, in writing, that

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[2] Of the 400 acres, a portion is owned by the U.S. Government and managed by the U.S. Bureau of Land Management (BLM). The remainder of Laguna Gatuna is privately owned or under contract to be sold to the Laguna Gatuna. (App. 12.) Laguna Gatuna had a permit from the BLM for its disposal operation. The BLM permit was revoked when EPA issued its cease and desist order.

[3] "Laguna" in Spanish means "small lake." A "sinkhole" is formed by the erosion of an underlying salt structure and its subsequent collapse. Playas, on the other hand, are formed by wind erosion or by the wallowing of buffalo.

the sinkhole did not constitute "waters of the United States." (App. 13.) With this understanding, Laguna Gatuna carried on its lawful business.

Then in 1991, the EPA changed its position and declared the sinkhole to be "waters of the United States." Subsequently, in May of 1992, the EPA served Laguna Gatuna with a "cease and desist" order pursuant to 33 U.S.C. § 1319(a) prohibiting any and all discharges into the sinkhole on pain of the penalties under the CWA.[4] The EPA's order, which is the final administrative decision of the agency, not subject to change, is based upon the EPA's factual and legal determination that the sinkhole constitutes "waters of the United States" and is subject to the EPA's CWA jurisdiction. 33 U.S.C. § 1362(7).

Laguna Gatuna complied immediately with the order issued by the EPA and ceased discharges into the sinkhole. As a result of its compliance with the EPA order, Laguna Gatuna has been driven out of business. (App. 15-16.)

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[4] A violation of the EPA's cease and desist order constitutes a violation of the CWA which carries penalties of $25,000 a day and three years in prison, as well as administrative penalties of up to $125,000, per violation. 33 U.S.C. § 1319(c),(d) & (g). (App. 28-43) "Knowing" violations of the Act are separately punishable under the CWA and carry penalties of up to $50,000 per day, plus three years in prison. 33 U.S.C. § 1319(c)(2). (App. 29-30.)

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE TENTH CIRCUIT CREATES A TRUE, DIRECT, AND IRRECONCILABLE CONFLICT WITH DECISIONS OF THIS COURT REGARDING THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The holding of the Tenth Circuit Court of Appeals that Laguna Gatuna may not challenge the determination of the EPA that Laguna Gatuna's property is "waters of the United States," unless and until Laguna Gatuna violates the EPA's cease and desist order, denies Laguna Gatuna its due process rights as guaranteed by the Fifth Amendment of the Constitution.[5] Moreover, that decision places the Tenth Circuit in direct and irreconcilable conflict with several holdings of this Court.

For example:

> The Due Process Clause of the Fifth Amendment guarantees that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property.

U.S. v. James Daniel Good Real Property, 114 S. Ct. 492, 498 (1993).

> This Court consistently has held that some form of hearing is required before an individual is

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[5] The Tenth Circuit Court of Appeals held: "[W]e conclude that the CWA provides no basis for such proceeding, *despite strong due process arguments advanced by the appellant.*" (App. 2.) (Emphasis added.)

> finally deprived of a property interest. (Citations omitted) The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."

Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

This Court has held that a procedural due process claim has two components. First, a party must show that a constitutionally-protected property or liberty interest has been taken. Second, the party must show that the procedural safeguards surrounding the deprivation were inadequate. *See, Board of Regents v. Roth*, 408 U.S. 564, 568-69 (1972).

Laguna Gatuna, as owner of the property upon which the sinkhole is located, has a "protected property interest" in the property that the EPA claims to be "waters of the United States." Furthermore, Laguna Gatuna has "protected [liberty] interest[s]" in its ability "to contract, to engage in any of the common occupations of life . . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Roth*, 408 U.S. at 572.[6] Therefore, the first component of the test set forth by this Court has been met. Laguna Gatuna has property and liberty interests in both its land and its business that have been destroyed by the EPA's determination that the sinkhole constitutes "waters of the United States."

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[6] "By the same token, the Court has required due process protection for deprivations of liberty . . . . " *Id.*

As to the second component of procedural due process, the adequacy of the procedural safe guards, this Court has held: "When protected [property and liberty] interests are implicated, the right to some kind of *prior* hearing is paramount." *Roth*, 408 U.S. at 569-70. (Emphasis added.) Nevertheless, Laguna Gatuna had no hearing: neither a hearing prior to the issuance of the order by the EPA that the sinkhole constitutes "waters of the United States" and that all discharges must cease, nor judicial review subsequent to the EPA's order. Moreover, under the holding of the Tenth Circuit, Laguna Gatuna will never receive any judicial review.

In its holding, the Tenth Circuit, while noting that Laguna Gatuna's "argument" was "well taken," ignored what this Court has recognized as "the dilemma of either obeying the law and thereby forgoing any possibility of judicial review, or risking 'enormous' and 'severe' penalties, [that] effectively cut off all access to the courts." *Thunder Basin Coal Company v. Reich*, 510 U.S. ___, 127 L.Ed.2d 29, 46 (1994). (Scalia, J. concurring).

As this Court has held, the Constitution compels the right to be heard:

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his [property]. . . . For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. . . . "[And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of

> serious loss notice of the case against him and opportunity to meet it."

Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972).

Unlike the facts in *Thunder Basin Coal* where this Court held that it "need not consider [the due process] claim, because neither compliance with, nor continued violation of, the statute will subject petitioner to a serious prehearing deprivation," in this case Laguna Gatuna has been subjected to such deprivation. *Thunder Basin Coal*, 127 L.Ed.2d at 43. In fact, Laguna Gatuna has been driven out of business by the EPA's order. Clearly, unlike the facts in *Thunder Basin Coal* this is "evidence that [Laguna Gatuna] will be subject to serious harm if it complies with [the EPA's order]." *Id.* Thus, "the practical effect [of the hundreds of thousands of dollars of fines and jail time for violation of the EPA's order] for non-compliance [is] to foreclose all access to the courts." *Id.* at 44. Furthermore, "this [is] a situation in which compliance is sufficiently potent that a constitutionally intolerable choice [is] presented." *Id.* The holding of the Tenth Circuit is clearly in error since it is contrary to the holding of this Court in *Thunder Basin Coal*.

The holding of the Tenth Circuit deprives Laguna Gatuna of the constitutional guarantees this Court has held are required before deprivation of a property or liberty interest can occur. Thus, the Tenth Circuit's opinion represents a true, direct and irreconcilable conflict with the numerous holdings of this Court.

II. THE DECISION OF THE TENTH CIRCUIT CREATES A TRUE, DIRECT, AND IRRECONCILABLE CONFLICT WITH DECISIONS OF THIS COURT REGARDING THE REVIEWABILITY OF ADMINISTRATIVE ORDERS.

The Tenth Circuit Court of Appeals held that orders issued in accordance with 33 U.S.C. § 1319(a) of the CWA are not reviewable, notwithstanding the fact that the CWA does not preclude judicial review of the cease and desist orders issued by the EPA under 33 U.S.C. § 1319(a)(3). The Tenth Circuit's holding is in direct conflict with this Court's rulings that judicial review of agency action is available unless Congress specifically forbids review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). In the absence of evidence that Congress intended to prohibit pre-enforcement review of § 1319(a) orders under the CWA, federal courts have subject matter jurisdiction to review the agency action.

This Court has recently set forth the test to determine whether judicial review is precluded by a particular statute:

> Whether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review.

Thunder Basin Coal, 127 L.Ed.2d at 38. (Citations omitted.) In the case at bar, there has been no "meaningful review" of Laguna Gatuna's claims that the EPA lacks jurisdiction over the sinkhole in New Mexico. Furthermore, a review of the CWA concludes that Congress did not intend to preclude judicial review.

A. THE DECISION OF THE TENTH CIRCUIT CREATES A TRUE, DIRECT, AND IRRECONCILABLE CONFLICT WITH DECISIONS OF THIS COURT SINCE LAGUNA GATUNA IS DENIED THE RIGHT TO "MEANINGFUL REVIEW" OF ITS CLAIMS.

In *Thunder Basin Coal* this Court held that "whether the claims can be afforded meaningful review" is an essential element of the test to determine if a statute precludes judicial review. *Thunder Basin Coal*, 127 L.Ed.2d at 38.[7] Thus, even if a court finds that the "language, structure, and purpose" and/or the "legislative history" of a particular statute precludes judicial review, the court must still determine "whether the claims can be afforded meaningful review." *Id.* Otherwise, constitutionally required due process has not been afforded.

Despite the clarity of the holding of this Court on the subject, the Tenth Circuit ignored the fact that there was no "meaningful review." Under the holding of the Tenth Circuit, judicial review is precluded forever since Laguna Gatuna has no intention of violating the EPA cease and desist order and since the EPA will not bring an "enforcement action" against Laguna Gatuna until Laguna Gatuna violates the cease and desist order. Thus, Laguna Gatuna is forced to submit to the intolerable position of having to "obey[] the [administrative order] and thereby forgo[]

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[7] Since the test this Court has articulated to determine whether a statutory scheme precludes review consists of several elements divided by the conjunction "and," each of those elements must be met before judicial review can be precluded by the statute.

any possibility of judicial review, or risk[] 'enormous' and 'severe' penalties, effectively cut[ting] off all access to the courts." *Thunder Basin Coal,* 127 L.Ed.2d at 46. This is a true Hobson's choice.

The holding of the Tenth Circuit thus violated this Court's rulings that judicial review is not precluded by an act of Congress if the statute denies "meaningful review." Regardless of the provisions of the CWA or its legislative history, judicial review is compelled by this Court's holding in *Thunder Basin Coal.*

B. THE DECISION OF THE TENTH CIRCUIT CREATES A TRUE, DIRECT, AND IRRECONCILABLE CONFLICT WITH DECISIONS OF THIS COURT SINCE THE LANGUAGE, STRUCTURE, PURPOSE AND LEGISLATIVE HISTORY OF THE CLEAN WATER ACT EVIDENCE NO INTENT TO PRECLUDE JUDICIAL REVIEW.

The presumption of judicial review may be overcome "by specific language or specific legislative history that is a reliable indicator of congressional intent." *Block v. Community Nutrition Institute,* 467 U.S. 340, 349 (1984). In this case both the CWA and its accompanying legislative history are totally silent on the issue of judicial review of § 1319(a) orders. Thus, the statute and its history lack the clear and convincing evidence necessary to demonstrate Congressional intent to deny judicial review.

Moreover, simply because Congress expressly provided for review of 33 U.S.C. § 1319(g) orders, (which are altogether different from 33 U.S.C. § 1319(a) orders), in

the 1987 CWA amendments, does not indicate Congressional intent to preclude review of 33 U.S.C. § 1319(a) orders.[8] The presumption of review is not rebutted when a statute expressly provides the right of review for certain agency actions and decisions, but makes no mention of review of other decisions by the agency:

> The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. *The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.*

Abbott Laboratories, 387 U.S. at 141. (Emphasis added.)

Furthermore, given that Congress specifically precluded judicial review of "emergency orders" under the CWA, it is clear that Congress was capable of denying, and did deny, judicial review when it determined such denial was appropriate and within a statute's regulatory scheme.

Despite this Court's clear holding as to the manner in which judicial review may be denied, the Tenth Circuit Court of Appeals held that judicial review was denied for § 1319(a) orders. As a result, the holding of the Tenth Circuit is in true, direct and irreconcilable conflict with

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[8] Petitioner notes that Congress, in adding the 1987 Amendments, included the following provision:

> Nothing in this subsection shall change the procedures existing on the day before February 4, 1987, under other subsections of this section for issuance and enforcement of orders by the Administrator.

33 U.S.C. § 1319(g). Therefore, Congress specifically retained the right of judicial review that existed prior to the passage of the 1987 amendments.

this Court's holdings in *Thunder Basin Coal*, 127 L.Ed.2d at 38; *Block*, 467 U.S. 340; and *Abbott Laboratories*, 387 U.S. 136.

C. THE DECISION OF THE TENTH CIRCUIT CREATES A TRUE, DIRECT, AND IRRECONCILABLE CONFLICT WITH DECISIONS OF THIS COURT REGARDING THE FACT THAT CONSTITUTIONAL GUARANTEES ARE SUPERIOR TO PUBLIC POLICY CONCERNS.

The Tenth Circuit affirmed the decision of the District Court because "[j]udicial review of every unenforced compliance order would undermine the EPA's regulatory authority." (App. 7.) In the case at bar, Laguna Gatuna's challenge to the EPA's determination that Laguna Gatuna's property is "waters of the United States" does not affect "the EPA's regulatory authority." In fact, Laguna Gatuna has complied with the cease and desist order issued by the EPA. Moreover, in cases such as this, in which the activity has ceased and the only issue is the validity of the agency action, "the EPA's regulatory authority" will not be undermined. When an alleged violator continues with its activity despite an EPA compliance order, the EPA may seek a temporary restraining order or preliminary injunction while a court challenge to that compliance order is pending. In the case of an emergency, the EPA may use its emergency powers under the CWA. 33 U.S.C. § 1364(a).

Laguna Gatuna challenges only the EPA's determination that the sinkhole is "waters of the United States." Laguna Gatuna does not seek to keep the EPA from enforcing the CWA, but it merely seeks review by a

federal court of whether EPA's determination is in accordance with federal law. It is an action brought to preserve Laguna Gatuna's due process rights.

Even if the Tenth Circuit was correct that Laguna Gatuna's action would interfere with the EPA's regulatory authority that consideration is irrelevant in the face of a constitutional guarantee. The Tenth Circuit may not so easily brush aside due process guarantees out of concern for "regulatory authority." As this Court has held:

> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way. . . .

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

Clearly, the holding of the Tenth Circuit is in true, direct and irreconcilable conflict with the decisions of this Court.

D. THE DECISION OF THE TENTH CIRCUIT CREATES A TRUE, DIRECT, AND IRRECONCILABLE CONFLICT WITH DECISIONS OF THIS COURT REGARDING THE INTERPRETATION OF A FEDERAL STATUTE.

When courts have found legislative intent to preclude judicial review of agency actions, those courts have found evidence of such intent in the act's legislative history or in the act itself. For example, in *Lloyd A. Fry Roofing Co. v. U.S. Environmental Protection Agency*, 554 F.2d 885 (8th Cir. 1977), even though the court found the Clean Air Act silent on preclusion, there was evidence in

the legislative history supporting preclusion. That is, language specifically preserving the right to judicial review of the challenged agency action had been deleted from the Clean Air Act in conference committee. *Fry*, 554 F.2d at 890. In this case the Tenth Circuit looked beyond the CWA to find authority for denying judicial review.[9] Because the CWA is silent both on its face and in its legislative history as to the question of judicial review, the right of citizens to judicial review must be presumed.

This court has held that the presumption of judicial review may be overcome only "by specific language or specific legislative history that is a reliable indicator of congressional intent." *Block*, 467 U.S. at 349 (1984). Furthermore:

> The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. *The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.*

Abbott Laboratories, 387 U.S. at 141. (Emphasis added.) *See also, Thunder Basin Coal*, 127 L.Ed.2d at 38. Nowhere does this Court sanction a review of a separate and totally unrelated statute to discern Congressional intent. Only the statute at issue can provide the clear Congressional intent. *Webster v. Doe*, 486 U.S. 592, 603 (1988); *See also National Labor Relations Board v. Food and Commercial Workers*, 484 U.S. 112, 131 (1987). By finding authority from other federal statutes the decision of the Tenth Circuit is in true, direct, and irreconcilable conflict with

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[9] The Tenth Circuit cited "analogous authority concerning . . . CERCLA and the Clean Air Act." (App. 4.)

decisions of this Court that the statute at issue is the only "reliable indicator of congressional intent." *Block*, 467 U.S. at 349 (1984).

E. THE DECISION OF THE TENTH CIRCUIT CREATES A TRUE, DIRECT, AND IRRECONCILABLE CONFLICT WITH DECISIONS OF THIS COURT THAT THERE IS A STRONG PRESUMPTION OF JUDICIAL REVIEW.

This Court has held consistently that actions of federal administrative agencies are presumed to be reviewable in federal courts. *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984).[10] This presumption of reviewability was articulated clearly in *Abbott Laboratories* where this Court held "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories*, 387 U.S. at 140. Thus, courts may restrict access to judicial review only upon a showing of "clear and convincing evidence" of legislative intent to restrict review. *Abbott Laboratories*, 387 U.S. at 141. "The statutory preclusion of judicial review must be demonstrated clearly and convincingly." *National Labor Relations Board v. Food and Commercial*

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[10] Further this Court has held that this presumption of reviewability of agency action predates enactment of the APA. *See American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902). The APA simply codified this longstanding presumption.

Workers, 484 U.S. 112, 131 (1987).[11] Furthermore, such intent must be demonstrated persuasively. *Abbott Laboratories*, 387 U.S. at 140.

Notwithstanding the holding of this Court in *Abbott Laboratories*, the Tenth Circuit relied not upon "clear and convincing evidence" in the CWA to deny judicial review, but relied instead on "analogous authorities." (App. 4.) This the Tenth Circuit cannot do. Therefore, the decision of the Tenth Circuit is in true, direct, and irreconcilable conflict with the decisions of this Court that presume judicial review.

III. THE DECISION OF THE TENTH CIRCUIT CREATES A TRUE, DIRECT, AND IRRECONCILABLE CONFLICT WITH THE DECISION OF THIS COURT IN *THUNDER BASIN COAL COMPANY V. REICH* REGARDING LAGUNA GATUNA'S RIGHT TO JUDICIAL REVIEW.

The decision of the Tenth Circuit is in direct conflict with the decision of this Court in *Thunder Basin Coal*, 127 L.Ed.2d 29 (1994). In *Thunder Basin Coal* the challenge was not to the jurisdiction of the Secretary of Labor under the Mining Act because there was no question that jurisdiction existed. However, in the case at bar, jurisdiction of the EPA is the seminal issue. This issue was addressed by the Seventh Circuit in *Rueth v. United States Environmental Protection Agency*, 13 F.3d 227 (7th Cir. 1993):

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[11] *Accord Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975); *Turner v. U.S. Parole Comm'n*, 810 F.2d 612, 613 (7th Cir. 1987); *Peoples Gas, Light & Coke Co. v. U.S. Postal*, 658 F.2d 1182 (7th Cir. 1981).

> On the other hand, it is not inconceivable that the EPA or the Corps of Engineers might completely overextend their authority. In such a case, we suggest to those agencies that *we will not hesitate to intervene in agency* activity . . . .

Id. at 231. (Emphasis added.) Laguna Gatuna asserts that the EPA has "completely overextended [its] authority" and that judicial review must be had to determine the validity of Laguna Gatuna's claims.[12] For as the Fifth Circuit has held:

> A procedure that seems perfectly reasonable under one set of circumstances can, with only a slight modification of the facts, suddenly smack . . . of administrative tyranny.

Buttrey v. United States, 690 F.2d 1170, 1178 (5th Cir. 1982). The "set of circumstances" in this case illustrates how easily the "procedure" can "suddenly smack of administrative tyranny."[13] As this Court has noted, Laguna Gatuna has "no other means within [its] control . . . . to

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[12] "[I]t is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

[13] "Unchecked authority breeds arrogance and overreaching in those who possess it and disrespect and suspicion in those who are subject to it." Albrecht and Issacs, Wetlands Jurisdiction and Judicial Review, Natural Resources and Environment, Summer 1992, at page 67.

protect and enforce" its rights.[14] *Thunder Basin Coal*, 127 L.Ed.2d at 40.

In *Thunder Basin Coal* this Court held that "[c]hallenges [under the Mine Safety Act] to enforcement are reviewed by . . . [a] Commission which is independent of the Department of Labor." *Thunder Basin Coal*, 127 L.Ed.2d at 36. Yet, in this case, totally unlike the situation in *Thunder Basin Coal*, there is no independent commission to provide meaningful review. *Id.* at 44. Instead, the EPA acts as prosecutor, jury and judge, with full authority to bring charges, review the charges and the evidence, and assess penalties, without any opportunity for citizens to obtain review of the underlying facts that may or may not justify the original exercise of jurisdiction.

Finally, *Thunder Basin Coal* is a "pre-enforcement case because petitioner sued before any order was issued." *Thunder Basin Coal*, 127 L.Ed.2d at 43. Notwithstanding the holding of the Tenth Circuit that this case concerns "pre-enforcement review," this case does not involve pre-enforcement review.[15]

The EPA is already enforcing its view of the requirements of the CWA and has done so through its cease and desist order. In fact, 33 U.S.C. § 1319, the section of the CWA under which the cease and desist order was issued,

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[14] "If not allowed to pursue [its] claims in the district court, [Laguna Gatuna] would not as a practicable matter be able to obtain meaningful judicial review." *Thunder Basin Coal*, 127 L.Ed.2d at 41.

[15] "[Pre-enforcement review is] a suit brought by one before any attempted enforcement of the statute or regulations against him." *Abbott Laboratories v. Gardner*, 387 U.S. at 139 n.1.

is captioned "Enforcement." (App. 25.) The EPA's action against Laguna Gatuna, pursuant to 33 U.S.C. § 1319(a), constitutes "enforcement" as that term is commonly understood.[16] By administrative order, the EPA has required Laguna Gatuna to cease and desist discharges into the sinkhole. With the threat of administrative penalties of up to $125,000.00, up to three years in jail and/or civil liability accruing at the rate of $25,000.00 per day, the EPA has compelled compliance with its view of the requirements of the CWA.[17] Thus, the EPA is engaged, by its order, in "the compelling of the fulfillment" of its view of the CWA. If this is not enforcement, as all people know it to be, then words have lost their meaning. Clearly, the EPA's actions taken pursuant to 33 U.S.C. § 1319(a), the "Enforcement" section, with regard to Laguna Gatuna, constitute "enforcement."

For all of these reasons, *Thunder Basin Coal* strongly supports Laguna Gatuna's position that the District Court has subject matter jurisdiction to hear and decide the claims raised. Thus, the decision of the Tenth Circuit creates a true, direct, and irreconcilable conflict with the

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[16] Laymen define "enforce" as "to put in force: cause to take effect: give effect to esp. with vigor (-laws)." "Enforcement" is defined as: "the compelling of the fulfillment (as of a law or order)." Websters' *Third New International Dictionary of the English Language*, Unabridged (1981). The EPA's actions here certainly fit that common-sense definition.

[17] "The alternative to compliance . . . may be even more costly. . . . To require [Laguna Gatuna] to challenge [the EPA's decision] only as a defense to an action brought by the Government might harm them severely and unnecessarily." *Abbott Laboratories*, 387 U.S. at 153. *See also Thunder Basin Coal*, 127 L.Ed.2d at 46 (Scalia, J. concurring).

decision of this Court in *Thunder Basin Coal* both as to the meaning of the "pre-enforcement" and as to the requirements of the due process clause.

IV. THE DECISION OF THE TENTH CIRCUIT CREATES A TRUE, DIRECT, AND IRRECONCILABLE CONFLICT WITH DECISIONS OF THIS COURT THAT STATUTORY PRECLUSION OF JUDICIAL REVIEW OF AGENCY ACTION CANNOT FORECLOSE CONSIDERATION OF CONSTITUTIONAL OR LEGAL QUESTIONS.

It is well-settled that federal courts have jurisdiction to review the constitutionality of governmental actions. *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803). While Article III of the Constitution vests Congress with the power to determine the jurisdictional authority of federal district courts, that power is limited by constitutional guarantees. *See Califano v. Sanders*, 430 U.S. 99, 109 (1977); *Oestereich v. Selective Service System*, 393 U.S. 233, 243 n.6 (1968); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936). As the Court of Appeals for the Second Circuit held:

> while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of the federal courts other than the Supreme Court, it must not so exercise that power to deprive any person of life, liberty or property without due process of law or to take property without just compensation.

Battaglia v. General Motors, 169 F.2d 254, 257 (2nd Cir. 1948), *cert. denied*, 355 U.S. 887 (1948).

A legal or constitutional challenge to the CWA, or its implementing regulations, can never be precluded. Laguna Gatuna has asserted such challenges to the EPA enforcement scheme in this case. (App. 18.) Laguna Gatuna cannot be precluded from testing the legality or constitutionality of the EPA's implementation of the CWA, or its implementing regulations.

Laguna Gatuna asserts that the enforcement action against it violates the Due Process Clause of the Fifth Amendment. Nevertheless, the Tenth Circuit has interpreted the CWA so as to preclude constitutional review of 33 U.S.C. § 1319(a) orders. Such an interpretation has been held to raise serious constitutional questions. *United States v. Emerson*, 846 F.2d 541, 544 (9th Cir. 1988) (if a statute is interpreted to preclude constitutional review, serious doubts about the statute's constitutionality are raised); *National Federation of Federal Employees v. Weinberger*, 818 F.2d 935, 940 (D.C. Cir. 1987). Since the claims raised by Laguna Gatuna are constitutional claims, the intent of Congress to preclude judicial review of those claims must be clear. *Webster v. Doe*, 486 U.S. at 603. A clear intent of Congress to preclude judicial review in this case cannot be shown. Since the decision of the Tenth Circuit is in true, direct and irreconcilable conflict with this well settled principle of law, Laguna Gatuna's petition should be granted.

CONCLUSION

For all of these reasons this Court must grant this petition to reverse the decision of the Tenth Circuit. For unlike the petitioner in *Thunder Basin Coal,* "[Laguna Gatuna cannot] obtain judicial review if it complies with the [EPA'S order] . . . . " *Thunder Basin Coal,* 127 L.Ed.2d at 46 (Scalia, J. concurring). This offends the fundamental constitutional guarantee of due process.

Respectfully submitted,

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Dated: September 18, 1995

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LAGUNA GATUNA, INC., a New Mexico Corporation,

Plaintiff-Appellant,

v.

CAROL BROWNER, Administrator of the Environmental Protection Agency; JOE D. WINKLE, Acting Regional Administrator, Region VI of the Environmental Protection Agency; ENVIRONMENTAL PROTECTION AGENCY, Carol M. Browner, Administrator,

Defendants-Appellees,

STONE SOUTHWEST CORPORATION, a Delaware Corporation,

Intervenor.

No. 94-2142.

Appeal from the United States District Court
For the District of New Mexico
D.C. No. CIV-93-772-JC

Todd S. Welch (William Perry Pendley with him on the briefs), Mountain States Legal Foundation, Denver, CO, for Plaintiff-appellant.

John A. Bryson (Robert L. Klarquist and Joshua M. Levin, Dept. of Justice, Washington, DC, Lois J. Schiffer, Asst. Atty. Gen., John J. Kelly, U.S. Atty., and Raymond Hamilton, Asst. U.S. Atty., Albuquerque, NM, Stephen J. Sweeney, U.S. E.P.A., Washington, DC, with him on the brief), Dept. of Justice, Washington, DC, for defendants-appellees.

Before SEYMOUR, Chief Judge, and MOORE and EBEL, Circuit Judges.

MOORE, Circuit Judge.

The sole question presented by this appeal is whether a compliance order issued by the Environmental Protection Agency (EPA) under the Clean Water Act (CWA) is subject to judicial review. Following the lead of our sister circuits which have already considered this issue, we conclude the CWA provides no basis for such a proceeding, despite strong due process arguments advanced by the appellant. We therefore affirm the judgment of the district court.

Plaintiff Laguna Gatuna, Inc., is a New Mexico corporation whose sole business is disposing of industrial waste water. It dumps the water in a "sinkhole" known as Laguna Gatuna, to which the company has appropriate rights. Defendants are the Environmental Protection Agency and its Administrators.

In 1987, Laguna's predecessor in interest inquired of the EPA whether the sinkhole was included in "waters of the United States" as defined by 40 C.F.R. Sec. 122.2,

subjecting it to EPA jurisdiction. The EPA responded by letter that it was not, based on the representation the sinkhole was "not hydrologically connected" to other waters and there were "no recreational, industrial, or other uses that could affect interstate commerce." In 1991, in the course of a study of playa lakes in New Mexico, the EPA discovered dead migratory birds near the sinkhole. In 1992, the EPA issued a compliance order to Laguna, directing it to cease dumping wastes into the sinkhole. Laguna complied with the order and discontinued operations.

Laguna filed an action for declaratory relief in district court, claiming the EPA had no jurisdiction to regulate the sinkhole because it was not "waters of the United States," and the issuance of the compliance order violated Laguna's procedural and substantive due process rights. The district court dismissed the action for lack of subject matter jurisdiction. This appeal was brought to review that dismissal.

Questions of jurisdiction are reviewed de novo. *Community Action of Laramie County, Inc. v. Bowen*, 866 F.2d 347, 351 n. 1 (10th Cir.1989). When deciding a question of jurisdiction, a court must construe all relevant allegations in the light most favorable to the plaintiff. See *Mitchell v. King*, 537 F.2d 385, 386 (10th Cir.1976). Accordingly, the facts set forth above are as alleged in the complaint. Laguna has asserted federal question jurisdiction under 28 U.S.C. Sec. 1331.

This court has not yet spoken on this precise issue. But see *Child v. United States*, 851 F.Supp. 1527 (D.Utah 1994); *Howell v. United States Army Corps of Eng'rs*, 794

F.Supp. 1072 (D.N.M.1992). We follow the authority of our sister circuits in *Southern Ohio Coal Co. v. Office of Surface Mining*, 20 F.3d 1418 (6th Cir.), cert. denied, ___ U.S. ___, 115 S.Ct. 316, 130 L.Ed.2d 278 (1994); *Rueth v. United States EPA*, 13 F.3d 227 (7th Cir.1993); and *Southern Pines Assocs. v. United States*, 912 F.2d 713 (4th Cir.1990). Accordingly, we affirm the dismissal for lack of jurisdiction.

In *Southern Pines*, the EPA issued a compliance order to cease dumping in the wetlands on its land in Chesapeake, Virginia, required Southern Pines to commence restoration, and requested further information to make a "final determination" about the wetlands. 912 F.2d at 714. Southern Pines filed a complaint for declaratory and injunctive relief, and the district court dismissed for lack of subject matter jurisdiction. *Id.* Based on the legislative history and language of the CWA, and analogous authority concerning the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Clean Air Act (CAA), the court was "persuaded that Congress meant to preclude judicial review of compliance orders under the CWA." *Id.* at 716. *Southern Pines* argued lack of review was a denial of due process, but the court rejected this argument. *Id.* at 717.

In *Rueth*, the EPA issued Rueth a compliance order to cease discharges into a wetlands area and to commence restoration of the wetlands. 13 F.3d at 228. Rueth sought an injunction in district court against enforcement of the order, and the case was dismissed for lack of jurisdiction. *Id.* On appeal to the Seventh Circuit, Rueth challenged the EPA's jurisdiction to regulate the wetlands, claiming, as Laguna does in the instant case, that the wetlands were

not part of the "waters of the United States." *Id.* at 231. The Seventh Circuit nevertheless upheld the dismissal. *Id.*; see also *Hoffman Group, Inc. v. EPA*, 902 F.2d 567 (7th Cir.1990).

In *Southern Ohio*, the plaintiff coal company proposed to discharge "untreated and minimally treated" floodwater from a coal mine into tributaries of the Ohio River. 20 F.3d at 1420. The Office of Surface Mining, Reclamation and Enforcement of the Department of the Interior (OSM) issued a cessation order against the company. The company filed suit seeking a temporary restraining order against OSM. The cessation order was vacated, and Southern Ohio began pumping. *Id.* at 1421. The EPA then threatened to issue a cease and desist order if Southern Ohio did not cease pumping. Southern Ohio joined the EPA as a party and obtained a restraining order against the EPA as well. The EPA moved to vacate the order for lack of jurisdiction. *Id.* at 1422. The district court denied the motion.

On appeal, the Sixth Circuit joined the Fourth and Seventh Circuits in holding Congress did not intend to allow judicial review of compliance orders. *Id.* at 1427. It reversed, noting the "enforcement provisions of the CWA were modeled after the enforcements provisions of the Clean Air Act," and "review of the caselaw under the CAA reveals the uniform holding that judicial review of pre-enforcement orders, similar to those issued under the CWA, is not available." *Id.* at 1426.

Laguna argues *Southern Ohio* is distinguishable because it involved a different quality of waste water from that discharged into the sinkhole in the instant case.

This argument goes to the merits of Laguna's dispute with the EPA, not to the federal court's jurisdiction to hear that dispute. Laguna further argues *Rueth* and *Southern Pines* are distinguishable because in the instant case the EPA is not in the process of conducting any fact-finding and has issued a final response to Laguna. However, these distinctions speak to the issue of finality, not reviewability. The EPA accurately points out that finality and reviewability are separate issues. *Thunder Basin Coal Co. v. Reich*, ___ U.S. ___, ___ n. 23, 114 S.Ct. 771, 782 n. 23, 127 L.Ed.2d 29 (1994). A decision must be final to be reviewable, but all final decisions are not reviewable.

We consider *Rueth*, *Southern Pines*, and *Southern Ohio* to be indistinguishable from this case. The plaintiffs in those cases made challenges to the compliance orders similar to those brought by Laguna: that their land lay without the definition of "waters of the United States" and that the compliance order and lack of federal review violated guarantees of substantive and procedural due process. Our sister circuits held there was no jurisdiction to make such challenges, and we see no reason to disagree.

Laguna argues *Riverside Irrigation Dist. v. Stipo*, 658 F.2d 762 (10th Cir.1981), is binding authority for the proposition judicial review is available when "the penalties are so severe that they foreclose a testing of authority by proceeding with the work." *Id.* at 767. However, Laguna takes this proposition out of context. *Riverside* is factually distinguishable: it did not involve a compliance order; it involved denial of a nationwide permit for which there was no application procedure; and it involved the contemplated construction of a water reservoir requiring a

large capital outlay. *Riverside* is doctrinally distinguishable: it was written before the 1987 amendment to the CWA providing for judicial review of civil penalties;[1] and like Laguna's arguments on appeal, *Riverside* addressed the issue of finality, not reviewability.

Laguna's policy argument that it should not be necessary to violate an EPA order and risk civil and criminal penalties to obtain judicial review is well taken. Nevertheless, following the reasoning of our sister circuits, we reject Laguna's conclusion such a situation is "constitutionally intolerable." Judicial review of every unenforced compliance order would undermine the EPA's regulatory authority.

The law in other circuits squarely precludes jurisdiction on these facts. The district court's order dismissing this case is *AFFIRMED*.

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[1] The Water Quality Act of 1987 added a mechanism for the assessment of administrative penalties and judicial review in federal court of any such penalties. Pub.L. No. 100-4, Title III, Sec. 314(a), 101 Stat. 48 (1987) (codified as amended at 33 U.S.C. Sec. 1319(g)).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

LAGUNA GATUNA, INC., Plaintiff,	)	
vs.	)	CIV 93-772 JC/WWD
CAROL BROWNER, JOE D. WINKLE, and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants.	)	

ORDER

THIS MATTER came on for consideration of the Defendant United States Environmental Protection Agency's Motion to Dismiss, filed September 20, 1993. The Court heard oral argument on the motion April 8, 1994 at 1:30 p.m. The Court shall adopt the reasoning set forth in *Rueth v. United States EPA*, 13 F.3d 227 (7th Cir.1993); and *Southern Pines Assocs. v. United States*, 912 F.2d 713 (4th Cir.1990), *Hoffman Group, Inc. v. EPA*, 902 F.2d 567 (7th Cir.1990) and *Howell v. United States Army Corps of Eng'rs*, 794 F.Supp. 1072 (D.N.M.1992). For the reasons set forth therein, and for the further reasons set forth on the record, Defendants' Motion shall be granted.

Wherefore,

IT IS HEREBY ORDERED that, Defendant United States Environmental Protection Agency's Motion to Dismiss be, and hereby is *granted*.

IT IS FURTHER ORDERED that this action be, and hereby is dismissed, in its entirety, for lack of subject

matter jurisdiction. All other motions currently pending in this action are hereby *denied as moot*.

April 8, 1994

/SIGNED/ JOHN E. CONWAY
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

LAGUNA GATUNA, INC., A New Mexico Corporation, Plaintiff, vs CAROL M. BROWNER, Administrator of the Environmental Protection Agency, JOE D. WINKLE, Acting Regional Administrator, Region VI of the Environmental Protection Agency, and the ENVIRONMENTAL PROTECTION AGENCY, Defendants.	)	Civil Action No: CIV-93-0772-JC

COMPLAINT AND JURY DEMAND

PARTIES

1. Plaintiff Laguna Gatuna, Inc. (Plaintiff Gatuna) is a corporation, organized and existing under the laws of the State of New Mexico and is currently in good standing. Plaintiff Gatuna's principal place of business is in Hobbs, Lea County, New Mexico. Plaintiff Gatuna holds an ownership interest in 400 acres of real property located in Sections 17 & 18, Range 32 East, Township 20 South, Lea County, New Mexico.

2. Defendant Carol M. Browner is the Administrator for the Environmental Protection Agency (EPA) and is sued in her official capacity.

3. Defendant Joe D. Winkle is Acting Regional Administrator for Region VI of the EPA and is sued in his

official capacity. The State of New Mexico is located in EPA Region VI.

4. The Environmental Protection Agency is an independent agency of the United States of America charged with the duty to enforce laws protecting the environment.

JURISDICTION AND VENUE

5. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331.

6. Venue is proper in the United States District Court for the District of New Mexico pursuant to 28 U.S.C. § 1391(e)(3), in that the real property which is involved in this action is located in the State of New Mexico.

FACTS

7. Plaintiff Gatuna is in the business of disposing of oil field production waters produced in the area around Laguna Gatuna (Laguna). Plaintiff Gatuna has constructed the necessary facilities to operate its business at Laguna Gatuna. Plaintiff Gatuna has invested $1,000,000.00 in the construction of said facilities.

8. Laguna Gatuna is a "sinkhole" located in sections 7, 17, 18, and 19 of Township 20 South, Range 33 East N.M.P.M., Lea County, New Mexico. No streams empty into Laguna Gatuna; no streams drain out of Laguna Gatuna; and there are no surface or groundwater connections between Laguna Gatuna and any other water body. Laguna Gatuna consists of approximately 398 acres, of which a portion is owned by the Federal Government and

managed by the Bureau of Land Management (BLM). Another portion is owned by the State of New Mexico. The remainder is owned or held with sufficient legal interest by Plaintiff Gatuna.

9. The land owned by the Federal Government and managed by the BLM is legally described as follows:

> S1/2 of the SE1/4 of Section 7; W1/2 of the NW1/4 of the NW1/4, SW1/4 of the NW1/4, and NW1/4 of the SW1/4 of Section 17, NE1/4 and N1/2 of the SE1/4 of Section 18, N1/2 of the NE1/4 of the NE1/4 of Section 19, and that part of the S1/2 of the NE1/4 of the NE1/4 of Section 19, lying North of U.S. Highway 62-180, Township 20 South, Range 33 East N.M.P.M., Lea County, New Mexico.

10. The land owned or held with sufficient legal interest by Plaintiff Gatuna is legally described as follows:

> SW1/4 of the SW1/4 of Section 17; S1/2 of the SE1/4, SW1/4, E1/2 of the NW1/4, and the SW1/4 of the NW1/4 of Section 18, Township 20 South, Range 33 East N.M.P.M., Lea County, New Mexico.

11. The land leased by Plaintiff Gatuna from the State of New Mexico for the purpose of disposing of oilfield brine is legally described as follows:

> That portion of the NW1/4 of the NE1/4 and N1/2 of the SE1/4 of Section 18, N1/2 of the NE1/4 of the NE1/4 of Section 19, and that part of the S1/2 of the NE1/4 of the NE1/4 of Section 19, lying North of U.S. Highway 62-180, Township 20 South, Range 33 East N.M.P.M., Lea County, New Mexico.

12. The nearest stream to Laguna Gatuna is the Pecos River, located approximately 40 miles away.

13. In 1969, Pollution Control Inc., the predecessor company of Plaintiff Gatuna, obtained a permit from the BLM and a business lease from the State of New Mexico to dispose of brine water produced during oil extraction activities. In 1979, the BLM permit was reissued for a thirty (30) year period. In 1988 the permit and leases were transfered to Plaintiff Gatuna and Plaintiff Gatuna owned and operated same until they were canceled by the BLM, as hereinafter stated.

14. In 1987, Plaintiff Gatuna's predecessor in interest, Snyder Ranches, Inc., approached the EPA and requested a ruling concerning whether Laguna Gatuna was "waters of the United States" and, therefore, subject to the provisions of the Clean Water Act 33 U.S.C. § 1311 *et seq*. On or about August 13, 1987, EPA sent a letter to Plaintiff Gatuna indicating that Laguna Gatuna was not "waters of the United States" and disposal was allowed without a permit.

15. Plaintiff Gatuna alleges upon information and belief that in the spring of 1991, the United States Fish and Wildlife Service (FWS) stated in a letter that birds might use Laguna Gatuna.

16. Plaintiff Gatuna alleges upon information and belief that based on the information from the FWS, the EPA indicated Laguna Gatuna may be "waters of the United States" 33 U.S.C. § 1362(8) and subject to the Clean Water Act. Plaintiff Gatuna contacted the EPA, Region VI, and requested a meeting to provide information on the status of Laguna Gatuna as waters of the

United States. At the meeting EPA indicated it was necessary to make additional studies to ascertain the status of Laguna Gatuna. Plaintiff Gatuna alleges on information and belief that the promised studies were never completed.

17. After the meeting, FWS and EPA, in the course of studying all of the playa lakes in New Mexico, discovered dead birds in the vicinity of Laguna Gatuna and without further study or discussion ordered Plaintiff Gatuna to cease operations.

18. In May of 1992, EPA sent to Plaintiff Gatuna an Administrative Order requiring Plaintiff Gatuna to cease all operations involving the disposal of production waters at Laguna Gatuna or face the possibility of criminal or civil penalties pursuant to the Clean Water Act.

19. As a result of the Administrative Order, Plaintiff Gatuna contacted EPA, Region VI, to present evidence clearly refuting that Laguna Gatuna was "waters of the United States" subject to the Clean Water Act.

20. During the course of the meeting, Plaintiff Gatuna showed EPA that:

a. 1992 was an abnormally wet year with rain in the Hobbs area being more than 300% of normal;

b. surveys in the spring of 1991 showed no sign that Laguna Gatuna was being used by any wildlife, migratory or otherwise;

c. that the dead birds found at Laguna Gatuna in the spring of 1992 died of "salt poisoning" according to the autopsy;

d. an independent water analysis conducted in June of 1992 showed the water of Laguna Gatuna to have 263,000 mg/l of sodium chloride and a natural spring flowing into Laguna Gatuna had 251,000 mg/l of sodium chloride;

e. the produced water Plaintiff Gatuna was placing in Laguna Gatuna had only 35,000 mg/l of sodium chloride and, therefore, was doing more to prevent the salt poisoning of the birds than it was to cause it;

f. birds do not nest or feed on or near Laguna Gatuna;

g. Laguna Gatuna, under normal circumstances, is dry;

h. Laguna Gatuna has no shelter or food source for migratory birds; and

i. the presence of water fowl in the spring of 1992 was an aberration not likely to reoccur under normal circumstances.

21. Pursuant to the criminal penalty provisions of the Clean Water Act, a person "who willfully or negligently violates [the CWA] . . . shall be punished by a fine . . . or imprisonment . . . or by both." 33 U.S.C. § 1319(c)(1).

22. Pursuant to the civil penalty provisions of the Clean Water Act, any person "who violates [the CWA] . . . or violates any order issued by the Administrator . . . shall be subject to a civil penalty not to exceed $25,000 per day. . . . " 33 U.S.C. § 1319(d).

23. Subsequently, the BLM revoked the permit previously held by Plaintiff Gatuna and Plaintiff Gatuna is

now out of business as a result of the decision of the EPA and the BLM.

24. The issuance of the Administrative Order is final agency action and this matter is ripe for judicial review pursuant to the Administrative Procedure Act (APA) 5 U.S.C. § 706 *et seq.* and because of the due process claims under the United States Constitution.

COUNT I

DECLARATORY JUDGMENT AS TO CLEAN WATER ACT JURISDICTION

25. Plaintiff Gatuna realleges and incorporates by reference herein each and every allegation contained in paragraphs 1 through 21 of its complaint.

26. Section 301 of the Clean Water Act, 33 U.S.C. § 1311, provides that the discharge of any "pollutant" into "navigable waters" is unlawful unless authorized by a permit. The Clean Water Act defines "navigable waters" as the "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(8).

27. The EPA has promulgated certain regulations, which purport to "define" "waters of the United States." Pursuant to 40 C.F.R. § 230.3(s) "waters of the United States" are defined to include:

> all waters which are currently used or were used in the past, or may be susceptible to use in interstate or foreign commerce; all . . . playa lakes . . . the use, degradation or destruction of which could affect interstate or foreign commerce including . . . waters which are or could be used by interstate or foreign travelers for

> recreational or other purposes . . . [and waters] which are used or could be used for industrial purposes by industries in interstate commerce."

28. As a result of the regulations, the United States Government, through the EPA, has asserted Clean Water Act jurisdiction over the property owned by Plaintiff Gatuna and the property managed by the BLM for which Plaintiff Gatuna has a permit.

29. The property owned by Plaintiff Gatuna and the property owned by the BLM for which Plaintiff Gatuna holds a permit contain no "waters of the United States" subject to the regulations of the Clean Water Act.

30. The EPA regulations provide that the only administrative process which would allow Plaintiff Gatuna to challenge the decision of the EPA that Laguna Gatuna is "waters of the United States" is if Plaintiff Gatuna violates the cease and desist order and subjects itself to the criminal and civil penalties authorized by the Clean Water Act which amount to the possibility of going to jail or $25,000 per day as a civil penalty.

31. Additionally, the United States Government and the EPA are precluded from asserting Clean Water Act jurisdiction over the property of Plaintiff Gatuna and the BLM property for which Plaintiff Gatuna holds a permit for one or more of the following reasons:

a. The EPA's purported "interpretation" and/or "construction" of "waters of the United States" as applied to Plaintiff Gatuna's property exceeds the scope of the EPA's statutory authority;

b. As applied, the EPA's purported "interpretation" and/or "construction" of "waters of the United

States" would exceed Congress' power to regulate interstate commerce under Article 1, Section 8 of the United States Constitution;

c. The EPA's actions in expanding, and in effect amending, "waters of the United States" under the guise of purported "interpretation" and/or "construction" of "waters of the United States" constitutes rulemaking and as such is invalid because the rulemaking was and is being carried out in violation of the public notice and comment provisions of the Administrative Procedures Act, 5 U.S.C. § 553; and

d. The Government's assertion of Clean Water Act jurisdiction as applied violates Plaintiff Gatuna's rights of due process and equal protection under the law.

32. Gatuna has suffered irreparable harm as a result of the decision by the EPA. If the declaratory judgment sought herein is not granted, Plaintiff Gatuna will continue to suffer irreparable harm in that:

a. Plaintiff Gatuna will be forced to choose between exercising its rights to use its private property and "violating" the Clean Water Act;

b. BLM has revoked the permit held by Plaintiff Gatuna as a result of the decision made by the EPA that Laguna Gatuna is "waters of the United States;"

c. If Plaintiff Gatuna does continue its permitted operation, the government will accuse Plaintiff Gatuna of being a "flagrant and multiple violator;"

d. Plaintiff Gatuna has been and continues to be harmed, if not destroyed, by the "impending

charges" threatened explicitly and implicitly in the EPA's cease and desist order, in that Plaintiff Gatuna's business reputation has been diminished;

e. Plaintiff Gatuna may be subjected to criminal liability even though the question as to whether Laguna Gatuna is "waters of the United States" has not been established and is based on reasonable differences of opinion; and

f. Plaintiff Gatuna's credit relationship with lenders has been impaired.

33. A declaration as to the rights and other legal relations with respect to the property owned by Plaintiff Gatuna and the ability of the United States Government and the EPA to assert Clean Water Act jurisdiction over this property is required.

34. Plaintiff Gatuna is entitled to a plenary trial on the merits before this Court on the issue of whether the United States Government has Clean Water Act jurisdiction over Laguna Gatuna.

COUNT II

PROCEDURAL DUE PROCESS VIOLATION
(Taking of a liberty interest)

35. Plaintiff Gatuna realleges and incorporates by reference herein each and every allegation contained in paragraphs 1 through 21 of its complaint.

36. Procedures implemented by the EPA do not allow Plaintiff Gatuna the opportunity to challenge, before an unbiased decision maker, that Laguna Gatuna is "waters of the United States," unless Plaintiff Gatuna is

willing to violate the "cease and desist order" and subject itself and its employees, directors, officers and representatives to possible civil and criminal penalties of the Clean Water Act.

37. Plaintiff Gatuna has a constitutional liberty interest in its ability to contract and to engage in the business of disposing of production waters within the bounds established by the law.

38. Since the actions of the EPA affect the above described liberty interest of Plaintiff Gatuna, Plaintiff Gatuna is guaranteed the right to a procedure to determine the factual basis and legality of the decision of the EPA to declare Laguna Gatuna "waters of the United States."

39. Whether Laguna Gatuna is "waters of the United States" is a factual dispute in need of resolution.

40. The actions of the EPA deprive Plaintiff Gatuna of constitutional liberties without due process of law as guaranteed by the Fifth Amendment and, as such, are unconstitutional actions.

COUNT III

PROCEDURAL DUE PROCESS VIOLATION
(Taking of a property interest)

41. Plaintiff Gatuna realleges and incorporates by reference herein each and every allegation contained in paragraphs 1 through 21 of its complaint.

42. EPA is an independent agency of the United States. The actions of the EPA in declaring Laguna Gatuna "waters of the United States" are state actions,

subject to the due process protections of the Fifth Amendment to the United States Constitution.

43. The actions of the EPA in declaring Laguna Gatuna "waters of the United States" deprives Plaintiff Gatuna of a property right without due process as guaranteed by the Fifth Amendment to the United States Constitution.

44. Whether Laguna Gatuna is "waters of the United States" is a factual dispute in need of resolution.

45. Actions of the EPA in depriving Plaintiff Gatuna of a constitutionally protected property right without due process is unconstitutional state action.

COUNT IV

SUBSTANTIVE DUE PROCESS VIOLATION
(Violation of constitutional equal protection guarantees)

46. Plaintiff Gatuna realleges and incorporates by reference herein each and every allegation contained in paragraphs 1 through 21 of its complaint.

47. The Clean Water Act and its implementing regulations are an arbitrary and invidious use of government power in that Plaintiff Gatuna has no opportunity to challenge the decision without subjecting itself to the civil and criminal penalties of the Clean Water Act and as such is an unconstitutional exercise of authority.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Gatuna respectfully requests:

1. An Order of Declaratory Judgment declaring that Laguna Gatuna, as described above, is not "navigable water," is not "water of the United States," and is not in any way subject to jurisdiction under the Clean Water Act by the United States Government, including the Army Corps of Engineers and the EPA;

2. An order declaring that EPA must provide due process before constitutionally guaranteed liberty and property interests are taken;

3. An order declaring that the actions of EPA are an unconstitutional exercise of authority;

4. Plaintiff Gatuna's costs and attorneys' fees incurred in bringing this action; and

5. Such other and further relief as to the court seems just and equitable in the premises.

JURY DEMAND

PLAINTIFF GATUNA DEMANDS A TRIAL BY JURY OF ANY AND ALL ISSUES IN THIS ACTION TRIABLE OF RIGHT BY A JURY.

DATED this day 22nd of June, 1993.

/signed/ Todd S. Welch
WILLIAM PERRY PENDLEY
TODD S. WELCH
MOUNTAIN STATES LEGAL FOUNDATION
1660 Lincoln Street
Suite 2300
Denver, Colorado 80264
(303) 861-0244

AND

/signed/ J.W. Neal
J.W. NEAL
J.W. NEAL, P.C.
Box 278
Hobbs, New Mexico 88240
(505) 397-3614

Attorneys for Plaintiff Laguna Gatuna, Inc.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

33 U.S.C.A. § 1319. Enforcement

(a) State enforcement; compliance orders

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has

been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person –

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time

extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) Criminal penalties

(1) Negligent violations

Any person who –

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this

title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who –

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement

imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment

(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title

by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(B) Additional provisions

For the purpose of subparagraph (A) of this paragraph –

(i) in determining whether a defendant who is an individual knew that his conduct placed another person in imminent danger of death or serious bodily injury –

(I) the person is responsible only for actual awareness or actual belief that he possessed; and

(II) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

except that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information;

(ii) it is an affirmative defense to prosecution that the conduct charged was consented to by the

person endangered and that the danger and conduct charged were reasonably foreseeable hazards of –

(I) an occupation, a business, or a profession; or

(II) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent;

and such defense may be established under this subparagraph by a preponderance of the evidence;

(iii) the term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons; and

(iv) the term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(4) False statements

Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate

any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $20,000 per day of violation, or by imprisonment of not more than 4 years, or by both.

(5) Treatment of single operational upset

For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(6) Responsible corporate officer as "person"

For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

(7) Hazardous substance defined

For the purpose of this subsection, the term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of this title, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of Title 42, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. Sec. 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. Sec. 6901 et seq.] has been suspended by Act of Congress), (D) any toxic

pollutant listed under section 1317(a) of this title, and (E) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15.

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title,[1] and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

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[1] So in original.

(e) State liability for judgments and expenses

Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

(f) Wrongful introduction of pollutants into treatment works

Whenever, on the basis of any information available to him, the Administrator finds that an owner or operator of any source is introducing a pollutant into a treatment works in violation of subsection (d) of section 1317 of this title, the Administrator may notify the owner or operator of such treatment works and the State of such violation. If the owner or operator of the treatment works does not commence appropriate enforcement action within 30 days of the date of such notification, the Administrator may commence a civil action for appropriate relief, including but not limited to, a permanent or temporary injunction, against the owner or operator of such treatment works. In any such civil action the Administrator shall join the owner or operator of such source as a party to the action. Such action shall be brought in the district court of the United States in the district in which the treatment works is located. Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source

to take such action as may be necessary to come into compliance with this chapter. Notice of commencement of any such action shall be given to the State. Nothing in this subsection shall be construed to limit or prohibit any other authority the Administrator may have under this chapter.

(g) Administrative penalties

(1) Violations

Whenever on the basis of any information available –

(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the "Secretary") finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary,

the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

(2) Classes of penalties

(A) Class I

The amount of a class I civil penalty under paragraph (1) may not exceed $10,000 per violation, except that the

maximum amount of any class I civil penalty under this subparagraph shall not exceed $25,000. Before issuing an order assessing a civil penalty under this subparagraph, the Administrator or the Secretary, as the case may be, shall give to the person to be assessed such penalty written notice of the Administrator's or Secretary's proposal to issue such order and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed order. Such hearing shall not be subject to section 554 or 556 of Title 5, but shall provide a reasonable opportunity to be heard and to present evidence.

(B) Class II

The amount of a class II civil penalty under paragraph (1) may not exceed $10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed $125,000. Except as otherwise provided in this subsection, a class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on the record in accordance with section 554 of Title 5. The Administrator and the Secretary may issue rules for discovery procedures for hearings under this subparagraph.

(3) Determining amount

In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or

violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(4) Rights of interested persons

(A) Public notice

Before issuing an order assessing a civil penalty under this subsection the Administrator or Secretary, as the case may be, shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order.

(B) Presentation of evidence

Any person who comments on a proposed assessment of a penalty under this subsection shall be given notice of any hearing held under this subsection and of the order assessing such penalty. In any hearing held under this subsection, such person shall have a reasonable opportunity to be heard and to present evidence.

(C) Rights of interested persons to a hearing

If no hearing is held under paragraph (2) before issuance of an order assessing a penalty under this subsection, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the Administrator or Secretary, as the case may be, to set aside such order and to provide a hearing on the penalty. If the evidence presented by the

petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator or Secretary shall immediately set aside such order and provide a hearing in accordance with paragraph (2)(A) in the case of a class I civil penalty and paragraph (2)(B) in the case of a class II civil penalty. If the Administrator or Secretary denies a hearing under this subparagraph, the Administrator or Secretary shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

(5) Finality of order

An order issued under this subsection shall become final 30 days after its issuance unless a petition for judicial review is filed under paragraph (8) or a hearing is requested under paragraph (4)(C). If such a hearing is denied, such order shall become final 30 days after such denial.

(6) Effect of order

(A) Limitation on actions under other sections

Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation –

(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

(B) Applicability of limitation with respect to citizen suits

The limitations contained in subparagraph (A) on civil penalty actions under section 1365 of this title shall not apply with respect to any violation for which –

(i) a civil action under section 1365(a)(1) of this title has been filed prior to commencement of an action under this subsection, or

(ii) notice of an alleged violation of section 1365(a)(1) of this title has been given in accordance with section 1365(b)(1)(A) of this title prior to commencement of an action under this subsection and an action under section 1365(a)(1) of this title with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

(7) Effect of action on compliance

No action by the Administrator or the Secretary under this subsection shall affect any person's obligation to comply with any section of this chapter or with the terms and conditions of any permit issued pursuant to section 1342 or 1344 of this title.

(8) Judicial review

Any person against whom a civil penalty is assessed under this subsection or who commented on the proposed assessment of such penalty in accordance with paragraph (4) may obtain review of such assessment –

(A) in the case of assessment of a class I civil penalty, in the United States District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or

(B) in the case of assessment of a class II civil penalty, in United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business,

by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator or the Secretary, as the case may be, and the Attorney General. The Administrator or the Secretary shall promptly file in such court a certified copy of the record on which the order was issued. Such court shall not set aside or remand such order unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion and shall not impose additional civil penalties for the same violation unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion.

(9) Collection

If any person fails to pay an assessment of a civil penalty –

(A) after the order making the assessment has become final, or

(B) after a court in an action brought under paragraph (8) has entered a final judgment in favor of the Administrator or the Secretary, as the case may be,

the Administrator or the Secretary shall request the Attorney General to bring a civil action in an appropriate district court to recover the amount assessed (plus interest at currently prevailing rates from the date of the final order or the date of the final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review. Any person who fails to pay on a timely basis the amount of an assessment of a civil penalty as described in the first sentence of this paragraph shall be required to pay, in addition to such amount and interest, attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to 20 percent of the aggregate amount of such person's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

(10) Subpoenas

The Administrator or Secretary, as the case may be, may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, or documents in connection with hearings under this

subsection. In case of contumacy or refusal to obey a subpoena issued pursuant to this paragraph and served upon any person, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the administrative law judge or to appear and produce documents before the administrative law judge, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(11) Protection of existing procedures

Nothing in this subsection shall change the procedures existing on the day before February 4, 1987, under other subsections of this section for issuance and enforcement of orders by the Administrator.

5 U.S.C.A. § 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Supreme Court, U.S.
FILED
DEC 11 1995
CLERK

(2)

No. 95-465

In the Supreme Court of the United States

OCTOBER TERM, 1995

LAGUNA GATUNA, INC., PETITIONER

v.

CAROL M. BROWNER, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a compliance order issued by the Environmental Protection Agency (EPA) under Section 309(a)(3) of the Clean Water Act, 33 U.S.C. 1319(a)(3), is subject to judicial review.

2. Whether Congress's preclusion of judicial review of EPA compliance orders violates due process.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is reported at 58 F.3d 564. The order of the district court (Pet. App. 8-9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1995. The petition for a writ of certiorari was filed on September 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." To that end, Section 301(a) of the Act, 33 U.S.C. 1311(a), prohibits the "discharge of any pollutant" except in accordance with the Act's specific requirements. The Act defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters," 33 U.S.C. 1362(12), and defines "navigable waters" as "the waters of the United States, including the territorial seas," 33 U.S.C. 1362(7). Regulations issued by the Administrator of the Environmental Protection Agency (the EPA), in turn, define "waters of the United States" to include, among other things, "waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, 'wetlands,' sloughs, prairie potholes, wet meadows, *playa lakes*, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters * * * [w]hich are used or could be used for industrial purposes by industries in interstate commerce." 40 C.F.R. 122.2(c) (emphasis added).

Discharges of pollutants into waters of the United States may be authorized by a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to Section 402 of the CWA. 33 U.S.C. 1342. See *EPA* v. *California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 (1976). NPDES permits may be issued either as "individual permits," to individual point source dischargers, or as "general permits," applicable to groups of point

sources involving the same or substantially similar types of operations. 40 C.F.R. 122.28. Whether individual or general, an NPDES permit may be challenged by any interested person in the appropriate court of appeals, within 120 days of issuance. 33 U.S.C. 1369(b)(1)(F).

Under Section 309 of the Act, when the EPA[1] discovers a violation, it may (i) issue an administrative order requiring compliance, 33 U.S.C. 1319(a)(3); (ii) initiate a civil action in a United States district court for appropriate relief, including a permanent or temporary injunction or monetary penalties, 33 U.S.C. 1319(b); or (iii) assess administrative penalties after an agency hearing, 33 U.S.C. 1319(g).[2]

A compliance order issued under Section 309(a)(3), 33 U.S.C. 1319(a)(3), is a document served on the discharger, which describes the nature of the violation and demands adherence to the requirements of the Act, sometimes including the initiation of remedial measures. The compliance order is not self-executing, however. To compel performance, the EPA must seek injunctive relief in district court, under Section 309(b), 33 U.S.C. 1319(b); to exact monetary penalties for noncompliance, the agency must either bring suit in district court under Section 309(b) or initiate administrative proceedings under Section 309(g), 33 U.S.C. 1319(g). Irrespective of the forum or the relief requested, the EPA has the

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[1] Enforcement of the Act is shared jointly by the EPA and the Army Corps of Engineers. See 33 U.S.C. 1319(a), (b) and (g); 33 C.F.R. 326.3(c)(1), 326.6. Because this case involves action by the EPA, for the sake of simplicity we refer only to the EPA in our description of the enforcement scheme.

[2] Violators are also subject to imprisonment and fines for criminal violations of the Act. 33 U.S.C. 1319(c).

burden of proving the statutory violation without regard to the existence of the compliance order. Consequently, issuance of a compliance order is merely an optional preliminary step in a process that may (depending on the agency's exercise of its prosecutorial discretion) result—after notice and opportunity for a hearing—in an injunction or in the assessment of a civil penalty.[3]

2. Petitioner was engaged in the business of disposing of waste brine, produced during oil extraction, in Laguna Gatuna, an area of approximately 398 acres located in Lea County, New Mexico. Laguna Gatuna is subject to seasonal inundation and is fed by a natural spring. No streams flow into or out of it. Pet. App. 2, 11-14.

In July 1987, petitioner's corporate predecessor wrote to the EPA, providing certain information in support of its request for confirmation that Laguna Gatuna was not "waters of the United States" within the purview of the CWA. Pet. App. 13; Pet. C.A. App. 120. The EPA replied (Pet. C.A. App. 120) as follows:

> Based on the information you submitted, EPA would not consider the referenced playa lake to be "waters of the United States" as that term is defined at 40 C.F.R. § 122.2. Playa lakes may be

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[3] If the EPA elects to seek an administrative penalty under Section 309(g), the agency must provide written notice to the discharger and afford the discharger 30 days to request a hearing on a proposed penalty order. 33 U.S.C. 1319(g)(2). Depending on the size of a proposed penalty, the hearings may be required to be held pursuant to the adjudicatory procedures of the Administrative Procedure Act, 5 U.S.C. 554. See 33 U.S.C. 1319(g)(2); 40 C.F.R. Pt. 22. The EPA's assessment of a civil penalty is expressly subject to judicial review. 33 U.S.C. 1319(g)(8).

> considered "waters of the United States" if they "would affect or could affect interstate or foreign commerce." You indicate in your letter that there are no recreational, industrial, or other uses that could affect interstate commerce, and that the playa lake is not hydrologically connected to "waters of the United States." Based on this understanding of the facts, EPA agrees that Laguna Gatuna would not be considered "waters of the United States."

On February 25, 1991, EPA Region VI issued a general NPDES permit applicable to certain facilities in New Mexico engaged in onshore oil and gas extraction, which contained a "no discharge" limitation for "produced water," including waste brine. 56 Fed. Reg. 7698, 7704 (1991). The general permit was subject to judicial review for 120 days after issuance (until June 25, 1991), pursuant to Section 509(b)(1)(F) of the CWA, 33 U.S.C. 1369(b)(1)(F).

In the spring of 1991, while the opportunity to challenge the general permit was still pending, the EPA notified petitioner that it now believed that Laguna Gatuna was "waters of the United States" subject to the EPA's jurisdiction under the CWA, based on new indications of Laguna Gatuna's use by migratory birds. Pet. App. 13-14. Thereafter, petitioner met with the EPA to provide the agency with information relating to petitioner's belief that Laguna Gatuna was not "waters of the United States" within the meaning of the Act. *Ibid.*

On May 22, 1992, after further study, the EPA issued a compliance order, under Section 309(a)(3), directing petitioner to cease discharging pollutants into Laguna Gatuna. Pet. App. 3, 14; Pet. C.A. App.

54-58. The order stated that Laguna Gatuna provided a nesting, feeding, and resting area for migratory birds, that the area was capable of receiving discharges by industries engaged in interstate commerce, and, therefore, that Laguna Gatuna was "waters of the United States." *Id.* at 56. The order notified petitioner that its disposal activities were not authorized by the terms of the general permit for discharges in New Mexico and, consequently, that its discharges into Laguna Gatuna violated Section 301(a) of the Act. Pet. C.A. App. 57.

Petitioner ceased dumping waste brine into Laguna Gatuna and met again with the EPA, to provide the agency with further information relating to petitioner's belief that Laguna Gatuna was not "waters of the United States." Pet. App. 14-15. The EPA did not, however, alter its determination or withdraw its order. Since then, petitioner has not discharged waste into Laguna Gatuna, and the EPA has taken no further action against petitioner.

3. In June 1993, petitioner filed an action for declaratory relief in the United States District Court for the District of New Mexico (Pet. App. 10-23), claiming that the EPA lacked jurisdiction over Laguna Gatuna, because (in petitioner's view) it was not "waters of the United States," and asserting that the EPA's issuance of the compliance order violated petitioner's due process rights, primarily because the CWA and its implementing regulations provide petitioner no way to challenge the EPA's determinations short of violating the order and thereby running the risk of a substantial penalty. Pet. App. 3, Pet. App. 19-21.

The district court granted the EPA's motion to dismiss the complaint for lack of jurisdiction, agreeing

that review of the agency's compliance orders is precluded by the CWA. Pet. App. 8 (citing *Rueth* v. *EPA*, 13 F.3d 227 (7th Cir. 1993); *Southern Pines Assocs.* v. *United States*, 912 F.2d 713 (4th Cir. 1990); *Hoffman Group, Inc.* v. *EPA*, 902 F.2d 567 (7th Cir. 1990); and *Howell* v. *United States Army Corps of Engineers*, 794 F. Supp. 1072 (D.N.M. 1992)).

The court of appeals affirmed. Pet. App. 1-7. After surveying the cases cited by the district court, and looking in addition to *Southern Ohio Coal Co.* v. *Office of Surface Mining, Recalamation & Enforcement*, 20 F.3d 1418 (6th Cir.), cert. denied, 115 S. Ct. 316 (1994), the court found "no reason to disagree" with the decisions of the Fourth, Sixth, and Seventh Circuits that judicial review is precluded by the CWA and that the Act's bar on pre-enforcement review does not violate due process. Pet. App. 6.

ARGUMENT

1. Petitioner argues (Pet. 11-19) that an EPA compliance order is subject to judicial review before, and in the absence of, any attempt by the EPA to enjoin the alleged violation or to assess civil penalties on account of it. The court of appeals, however, correctly concluded that the CWA precludes review of the EPA's compliance orders. That decision follows from the teachings of this Court and is consistent with the decisions of every other court of appeals that has considered the matter. There is accordingly no warrant for further review.

a. Although Congress is presumed to have intended judicial review of final agency action, *Abbott Lab.* v. *Gardner*, 387 U.S. 136, 140 (1967), review is not available where it has been specifically precluded by statute. 5 U.S.C. 701(a)(1); see *United States* v.

Fausto, 484 U.S. 439, 452 (1988) (The "presumption favoring judicial review is not to be applied in the 'strict evidentiary sense,' but may be 'overcom[e] whenever the congressional intent to preclude review is "fairly discernible in the statutory scheme."'"), quoting *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 351 (1984). Whether a particular statute (here, the CWA) "is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, [and] its legislative history." *Thunder Basin Coal Co.* v. *Reich*, 114 S. Ct. 771, 776 (1994).

In *Block*, this Court held that the Agricultural Marketing Agreement Act of 1937 implicitly precluded APA review of agency milk marketing orders at the behest of consumers. That Act incorporated an elaborate scheme of administrative and judicial review that did not involve consumers, and the Court found that permitting suits by consumers "would severely disrupt" the statutory scheme. 467 U.S. at 348.

In *Fausto*, the Court concluded that the Civil Service Reform Act of 1978 implicitly precluded review of certain adverse federal personnel actions that were not made expressly reviewable under that Act. In *Fausto*, as in *Block*, the Court's determination regarding Congress's intent to preclude review was based on "inferences of intent" drawn from the structure of the statute as a whole. 484 U.S. at 452.

Recently, in *Thunder Basin Coal Co.*, the Court examined the provisions of the Federal Mine Safety and Health Amendments Act of 1977, which provided expressly for review of Mine Safety and Health Administration (MSHA) citations. Under the statutory scheme, such citations were to be challenged

first before the Federal Mine Safety and Health Review Commission and then before the courts of appeals. 114 S. Ct. at 776-777. The Court held that Congress's express provisions for review of MSHA citations precluded by implication review of the MSHA's pre-citation determinations, as to which the statute was "facially silent." *Id.* at 777.

b. The structure of the CWA's enforcement scheme likewise demonstrates Congress's intention to preclude review of Section 309(a)(3) compliance orders. As we have explained, when the EPA finds that a person is in violation of the CWA, the agency is authorized to take action to remedy the situation. 33 U.S.C. 1319(a)(3). Congress provided the EPA with the flexibility to respond to such violations in a number of alternative and complementary ways. The agency is authorized immediately to initiate a civil enforcement action in district court (under Section 309(b)) or to institute administrative proceedings to assess civil penalties (under Section 309(g)). It may, however, choose initially to take the lesser step of issuing an ex parte order (under Section 309(a)(3)) notifying the discharger of the violation and demanding compliance. That option is distinguished both by the absence of any punitive sanction and by the expeditious fashion in which it can be employed: A compliance order can protect the environment from violations of the Act promptly and at minimal transaction cost to the agency, the courts, and the regulated parties. "[P]re-enforcement review of compliance orders would," however, "render that option a meaningless alternative to bringing a civil enforcement action at the outset, and effectively eliminate the compliance order as a means of expeditiously abating violations of the CWA without resort to

judicial process. It is doubtful Congress intended such a result." *Hoffman Group Inc.* v. *EPA*, 29 Env't Rep. Cas. (BNA) 1180, 1182 (N.D. Ill. 1989), aff'd, 902 F.2d 567 (7th Cir. 1990).

The Act's specific and detailed provision for judicial involvement in the EPA's enforcement proceedings also evidences Congress's intention that the courts refrain from pre-enforcement review. Under Section 309(a)(3), (b), and (d), upon the agency's initiation of a judicial action, the district court may adjudicate an alleged violation of the CWA in the first instance, order appropriate injunctive relief, and/or assess civil penalties. Under Section 309(g)(8), when the EPA assesses a penalty through its own administrative enforcement proceedings, the resulting enforcement order is reviewable in a district court or a court of appeals (depending on the size of the penalty) at the behest of the person assessed. 33 U.S.C. 1319(g)(8). The agency's enforcement order may not be set aside on judicial review "unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the [agency's] assessment of the penalty constitutes an abuse of discretion." *Ibid.* The CWA thus delineates carefully the occasions when (and the manner in which) the courts may intervene; the issuance of a compliance order under Section 309(a)(3) is not one of those occasions. Consistent with this Court's teachings, see *Thunder Basin Coal Co.*, 114 U.S. at 777; *Fausto*, 484 U.S. at 447-449; *Block*, 467 U.S. at 345-348; *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982), the CWA's express provision for judicial involvement in the EPA's enforcement actions suggests by negative implication that review of the agency's pre-enforcement determinations is precluded. *Southern*

Ohio Coal Co., 20 F.3d at 1426; *Hoffman Group*, 902 F.2d at 569-570; *Howell*, 794 F. Supp. at 1074.

The legislative history of the CWA provides further support for that conclusion. The CWA's enforcement provisions were modeled on those in the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*,[4] which also authorize the EPA to respond to a violation either by bringing an enforcement suit in district court or by issuing an administrative compliance order. 42 U.S.C. 7413(a)(1) and (b). Cases under the CAA have consistently held that Congress intended to preclude pre-enforcement judicial review of EPA compliance orders issued under that Act. See, *e.g.*, *West Penn Power Co.* v. *Train*, 522 F.2d 302, 311 (3d Cir. 1975), cert. denied, 426 U.S. 947 (1976); *Union Electric Co.* v. *EPA*, 593 F.2d 299, 304 (8th Cir.), cert. denied, 444 U.S. 839 (1979); *Lloyd A. Fry Roofing Co.* v. *EPA*, 554 F.2d 885, 889-891 (8th Cir. 1977); cf. *Pacificorp* v. *Thomas*, 883 F.2d 661 (9th Cir. 1988) (compliance order issued under CAA not final agency action).[5] Given the common derivation of the statutes'

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[4] The enforcement provisions of the CAA were codified in 1970. Clean Air Amendments of 1970, Pub. L. No. 91-604, § 4(a), 84 Stat. 1686-1687. The similar provisions of the CWA were adopted in 1972. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 859-860. The Senate committee report that proposed the new enforcement section of the CWA explained that it "drew extensively upon the provisions" of the 1970 CAA amendments. S. Rep. No. 414, 92d Cong., 1st Sess. 63 (1971).

[5] Several courts reached a similar result, later codified by Congress, under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.* See, *e.g.*, *Wagner Seed Co.* v. *Daggett*, 800 F.2d 310, 315 (2d Cir. 1986); *Wheaton Indus.* v. *EPA*, 781 F.2d 354, 356-357 (3d Cir. 1986); *United States* v. *Outboard Marine Corp.*, 789 F.2d 497,

enforcement schemes, those decisions under the CAA strongly suggest that there is no pre-enforcement review of compliance orders issued under the CWA. *Southern Ohio Coal Co.*, 20 F.3d at 1426; *Southern Pines Assocs.*, 912 F.2d at 716.

c. The lower courts have consistently concluded, from the language, structure, and history of the CWA, that the Act precludes judicial review of Section 309(a)(3) compliance orders. See, *e.g.*, *Southern Ohio Coal Co.*, 20 F.3d at 1426-1428; *Rueth*, 13 F.3d at 230; *Southern Pines Assocs.*, 912 F.2d at 715-716 (4th Cir. 1990); *Hoffman Group*, 902 F.2d at 569; *Child* v. *United States*, 851 F. Supp. 1527, 1533 (D. Utah 1994); *Salt Pond Assocs.* v. *United States Army Corps of Engineers*, 815 F. Supp. 766, 771 n.16 (D. Del. 1993); *Board of Managers* v. *Bornhoft*, 812 F. Supp. 1012, 1014 (D.N.D. 1993), aff'd, 48 F.3d 1223 (8th Cir. 1995) (Table); *Howell*, 794 F. Supp. at 1074; *Leslie Salt Co.* v. *United States*, 789 F. Supp. 1030, 1033-1034 (N.D. Cal. 1991); *Route 26 Land Dev. Ass'n* v. *United States*, 753 F. Supp. 532, 540 (D. Del. 1990), aff'd, 961 F.2d 1568 (3d Cir. 1992) (Table); *McGown* v. *United States*, 747 F. Supp. 539, 541-542 (E.D. Mo. 1990); *Fiscella & Fiscella* v. *United States*, 717 F. Supp. 1143, 1147 (E.D. Va. 1989).

d. Nothing in this Court's decision in *Thunder Basin Coal Co.* argues to the contrary. The Court suggested in that case that a statute might more readily be interpreted to permit pre-enforcement review if in the absence of early judicial involve-

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505-506 (7th Cir.), cert. denied, 479 U.S. 961 (1986); *J.V. Peters & Co.* v. *Administrator, EPA*, 767 F.2d 263, 264-265 (6th Cir. 1985); *Barnes* v. *United States District Court*, 800 F.2d 822 (9th Cir. 1986).

ment the complainant would have no opportunity for "meaningful review." 114 S. Ct. at 776. At issue there was a letter from the MSHA instructing a coal company to post the employees' designation of mine representatives pursuant to 30 U.S.C. 813(f). This Court concluded that, if the company chose not to comply and the agency initiated enforcement proceedings, the company's statutory and constitutional claims could "be meaningfully addressed" in the agency's proceedings and, on review, in the court of appeals. 114 S. Ct. at 779-780 & n.20.

Like the MSHA letter in *Thunder Basin Coal Co.*, the EPA compliance order at issue here is not self-enforcing. It imposes no penalty or other sanction. The issuance of such a compliance order does nothing to alter the legal position of the alleged violator. As the Fourth Circuit has explained:

> A compliance order is a document served on the violator, setting forth the nature of the violation and specifying a time for compliance with the Act. 33 U.S.C. § 1319(a)(5)(A). If a violator fails to abide by that order, EPA may seek to enforce the order by bringing a suit in federal district court under section 309(b) of the Act, 33 U.S.C. 1319(b). However, EPA need not issue a compliance order before bringing an action. The penalties for violating either the Act or a compliance order are the same. * * * The violator is subject to the same injunction and penalties whether or not EPA has issued a compliance order.

Southern Pines Assocs., 912 F.2d at 715-716. In effect, the compliance order merely apprises the alleged violator of the agency's pre-enforcement position. Its issuance is by no means a final administrative

determination that a violation has occurred.[6] If the EPA later "seeks judicial or administrative enforcement of penalties against [the alleged violator], then [it] will be entitled to [its] day in Court." *Rueth*, 13 F.3d at 230.[7]

2. Petitioner argues (Pet. 7-10) that the preclusion of review of the compliance order effected a deprivation of due process, because the consequences of disobeying the order are potentially so overwhelming that petitioner cannot realistically afford to disobey its mandate and test its legality in later enforcement proceedings. That contention is without merit.

In *Thunder Basin Coal Co.*, this Court acknowledged that the Mine Safety and Health Act's mandatory civil penalties "unquestionably may become onerous if petitioner chooses not to comply" with the agency's interpretation, but concluded that the petitioner would face no constitutional deprivation if it chose not to comply, because the Act's civil penalties "become final and payable only after full review by both the [Mine Safety and Health Review]

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[6] Indeed, because a compliance order does not "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process," *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948), several lower courts have concluded (correctly, in our view) that issuance of a compliance order is not "final agency action" for purposes of APA review. See, *e.g.*, *Child*, 851 F. Supp. at 1535; *Howell*, 794 F. Supp. at 1075; *Leslie Salt Co.*, 789 F. Supp. at 1033-1034; *Route 26 Land Dev. Ass'n*, 753 F. Supp. at 540.

[7] Because petitioner will have the unquestioned right to judicial review of any enforcement action, "this case does not implicate 'the strong presumption that Congress did not mean to prohibit all judicial review.'" *Thunder Basin Coal Co.*, 114 S. Ct. at 776 n.8.

Commission and the appropriate Court of Appeals." 114 S. Ct. at 781-782. See also *Board of Governors of Federal Reserve System* v. *MCorp Fin., Inc.*, 502 U.S. 32, 43-44 (1991) ("If and when the Board finds that MCorp has violated that regulation, MCorp will have, in the Court of Appeals, an unquestioned right to review of both the regulation and its application."). The very same reasoning applies here. See *Southern Pines Assocs.*, 912 F.2d at 717; *Hoffman Group*, 902 F.2d at 568-569.[8]

The absence of initial judicial review may offend due process in extreme cases where "the practical effect of coercive penalties [is] to foreclose all access to the courts." *Thunder Basin Coal Co.*, 114 S. Ct. at 782 (citing *Ex parte Young*, 209 U.S. 123, 148 (1908)). The CWA's enforcement scheme does not present

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[8] Contrary to petitioner's assertions, the analysis in this case does not differ simply because petitioner has chosen to characterize its complaint as a challenge to the EPA's jurisdiction, rather than a challenge to the EPA's application of the Act. "[T]here is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority. To exceed authorized application is to exceed authority. Virtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the 'authority.'" *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment). To the extent that there may be rare circumstances in which an agency "completely overextend[s] [its] authority," thereby necessitating judicial review, *Rueth*, 13 F.3d at 231, the EPA's issuance of the compliance order in this case, upon its determination that Laguna Gatuna constitutes "waters of the United States," was an action well within the scope of the EPA's statutory authority, irrespective of whether its determination was correct. See *Southern Ohio Coal Co.*, 20 F.3d at 1427-1428.

such a case, however, because it does not threaten such overwhelming and severe penalties as to cut off all access to the courts.

Although some penalty is required under the Act upon the finding of a violation, the amount of that penalty is subject to guided discretion. *Leslie Salt Co.* v. *United States*, 55 F.3d 1388, 1396-1397 (9th Cir.), cert. denied, 116 S. Ct. 407 (1995); *Atlantic States Legal Found., Inc.* v. *Tyson Foods, Inc.*, 897 F.2d 1128, 1142 (11th Cir. 1990); *Stoddard* v. *Western Carolina Regional Sewer Auth.*, 784 F.2d 1200, 1208 (4th Cir. 1986). Section 309(d) of the Act directs the district courts, in determining the amount of a civil penalty, to consider

> the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

33 U.S.C. 1319(d). Section 309(g)(3) similarly directs the EPA, in administrative proceedings, to take into account

> the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

33 U.S.C. 1319(g)(3). The common directive to consider "such other matters as justice may require"

affords the courts sufficient leeway to alleviate any due process concerns. See *Leslie Salt Co.*, 55 F.3d at 1397.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] Cf. *Wagner Seed Co.*, 800 F.2d at 316 (notwithstanding potential treble liability for refusal to comply with order for hazardous waste cleanup, due process is satisfied by judicial discretion over imposition of penalties); accord *Solid State Circuits, Inc.* v. *EPA*, 812 F.2d 383, 389-390 (8th Cir. 1987).

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1995

No. 95-465

LAGUNA GATUNA, INC.,
Petitioner,

v.

BROWNER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE AMERICAN FOREST & PAPER ASSOCIATION, INC. AND THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IN THE
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LAGUNA GATUNA, INC.,
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BRIEF OF THE AMERICAN FOREST & PAPER ASSOCIATION, INC. AND THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

Amicus curiae the American Forest & Paper Association, Inc. ("AF&PA") is a non-profit trade association whose member companies grow, harvest, and process wood and wood fiber, and manufacture pulp, paper, and paperboard products and solid wood products. Its member companies account for over 8% of total U.S. manufacturing output. *Amicus curiae* the National Association of Home Builders of the United States ("NAHB") represents 185,000 builders and associate members (*e.g.*, land planners, land developers, industrial developers) organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico.

Amicus AF&PA's member companies own or lease extensive tracts of land used for large manufacturing facilities or for the production of timber, including approximately 71 million acres of forest land. In addition, these companies rely on timber from the over 250 million acres of private, nonindustrial forest land. These lands contain many isolated areas where topographical depressions occasionally collect rainfall runoff that, under current U.S. Environmental Protection Agency ("EPA") policy, may be considered "waters of the United States." These companies also own and operate hundreds of man-made surface impoundments, used as water storage, treatment, or evaporation basins; cooling water or fire protection water ponds; log storage ponds; surface runoff sedimentation ponds; and the like.

Many of *amicus* NAHB's members engage in grading and construction on undeveloped land and often encounter questions about whether a particular area is regulated as a "wetland." They also construct temporary or permanent storm water runoff retention ponds, ornamental ponds, drainage ditches, and the like which may be considered "waters of the United States" under certain circumstances.

Because EPA's definition of "waters of the United States" is so broad and so vague that it could apply to virtually any property, under the Tenth Circuit's decision almost any of the *amici's* members (and countless other landowners) could be subjected to *ad hoc* EPA determinations of Clean Water Act ("CWA") jurisdiction that will escape judicial review unless the landowner risks harsh civil or criminal penalties.

SUMMARY OF ARGUMENT

The decision below would allow vast areas of land and millions of property owners across the country to be held captive to onerous regulatory restrictions

without the possibility of judicial review. If allowed to stand, the decision would permit EPA and the U.S. Army Corps of Engineers ("Corps") to deny landowners the productive use of their property, without any hearing whatsoever, unless the landowners elect to ignore the agencies' restrictions on land use and accept the risk of severe civil and criminal punishment. Unfortunately for property owners, by "rolling the dice" and disregarding the orders of EPA or the Corps, landowners not only significantly increase their chances of prosecution at the hands of the agencies, but also concomitantly increase the gravity of the penalties (including criminal sanctions) which may be levied against them.

The severe curtailment of property owners' rights condoned in the decision below, without the possibility of judicial review, clearly constitutes a deprivation of due process. This constitutional transgression is magnified by the *ad hoc* and unpredictable nature of assertions of jurisdiction by EPA and the Corps. Additionally, as a statutory matter, the preclusion of judicial review giving rise to this deprivation is unfounded in the Clean Water Act itself. Simply put, the issuance of a cease-and-desist order by EPA or the Corps pursuant to their wetlands authority constitutes a firm adjudication of a landowners' rights, yet the decision below would summarily deprive a landowner of the constitutional and statutory right to judicial review of this admittedly final adjudicatory determination. This Court's intercession is necessary to ensure that property owners are not stripped of their rights in derogation of both the Clean Water Act and the due process guarantee of the Constitution.

ARGUMENT

I. THIS COURT'S REVIEW IS NEEDED TO PROTECT THE DUE PROCESS RIGHTS OF COUNTLESS PRIVATE PROPERTY OWNERS

Seminal precedent from this Court holds that, pursuant to the Fifth Amendment of the Constitution, individuals must receive notice and an opportunity to be heard before the government may deprive them of property. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). In this case, the actual determination by EPA of its jurisdiction under the Clean Water Act amounted to an *ad hoc* adjudication of the Petitioner's property rights. Nevertheless, under the Tenth Circuit's decision, the only way Petitioner could seek review of this determination would entail subjecting the Petitioner to the possibility of severe criminal and civil punishment.[1] This deprivation of constitutionally-protected property rights -- in the absence of judicial review -- simply does not meet the minimum requirements of due process.[2]

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1 Other courts have reached a different conclusion on this point. *See, e.g., Stoeco Development, Ltd. v. Department of the Army Corps of Engineers*, 701 F. Supp. 1075 (D.N.J. 1988), *appeal dismissed*, 879 F.2d 860 (3d Cir. 1989) (considering a challenge brought by a developer to a cease and desist order issued by the Corps pursuant to its wetlands jurisdiction, before any penalties were sought or imposed); *Swanson v. United States*, 600 F. Supp. 802 (D. Idaho 1985), *aff'd*, 789 F.2d 1368 (9th Cir. 1986).

2 *See Ex Parte Young*, 209 U.S. 123, 147 (1908) (where "the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts ...," "a

The cease and desist order issued in this case included a determination by EPA that a sinkhole known as Laguna Gatuna was a "water of the United States" under the CWA. 33 U.S.C. § 1362(7) (1986). Such a determination subjects a property owner to the full panoply of CWA requirements. In this case, Petitioner was required to cease discharging to its own evaporation basin and, consequently, was driven out of business.

While Petitioner suffered particularly severe consequences as a result of EPA's assertion of jurisdiction, such assertions typically have significant consequences. Indeed, the mere identification of an area as a "water of the United States" severely encumbers the property. For example, an owner of land determined by EPA or the Corps to be a water of the United States is not only stripped of the right to freely landscape, cultivate, and develop the area, but may also be prevented from securing bank loans or obtaining title insurance for the property or otherwise managing the property as a productive asset. *See, e.g., Rueth v. EPA,* 13 F.3d 227, 230 (7th Cir. 1993) (noting the substantial curtailment of a landowner's property interest after EPA's exercise of "water of the United States" jurisdiction). A permit to use the land as desired may be denied outright, or it may be issued only after the landowner agrees to costly "mitigation" measures.[3]

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law which ... impos[es] such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained, is also unconstitutional").

3 *See, e.g.,* 60 Fed. Reg. 58605, 58607 (1995). The government may argue that a person may avoid enforcement and challenge EPA's jurisdictional determination after applying for a permit to discharge pollutants under CWA sections 402 or 404, 33 U.S.C. §§ 1342, 1344 (1986 and

Petitioner has excellent reasons for believing that its treatment basin is not a "water of the United States": the intrastate sinkhole is not hydrologically connected to any other water body. More significantly, at Petitioner's request in 1987, EPA's Office of Regional Counsel declared in writing that the Laguna Gatuna sinkhole was *not* a water of the United States. Nevertheless, according to the Tenth Circuit decision, Petitioner's only recourse with respect to EPA's reversal of its original position is to defy EPA's cease and desist order and subject itself to the possibility of grave civil and criminal penalties.[4] The *amici* are concerned that their members, too, could be forced to make a Hobson's choice between defying a compliance order to obtain review of an EPA determination, or acquiescing in the order, which would require them to forfeit substantial property interests without judicial review.

Supp. 1995). While such an appeal provides an opportunity to challenge either the denial of the issuance of the permit or the terms of the permit upon issuance, it is not clear that this forum provides the applicant who does not believe he needs a permit any real opportunity to challenge the underlying subjective determination as to whether a "water of the United States" exists in the first place.

4 A violation of the Clean Water Act can result in a civil penalty of $25,000 a day, a criminal penalty of up to $25,000 per day plus one year in prison, or administrative penalties of up to $125,000 per violation. 33 U.S.C. § 1319(c)(1), (d) & (g). Moreover, a "knowing" violation of the Act is further punishable by up to $50,000 per day, plus three years in prison. 33 U.S.C. § 1319(c)(2). A violation may be "knowing" even though the discharger was unaware its actions were regulated. *United States v. Weitzenhoff*, 1 F.3d 1523 (9th Cir. 1993), *cert. denied*, ___ U.S. ___ (1995).

This fundamentally unfair situation is especially deserving of this Court's review in light of the broad implications of the Tenth Circuit's decision. The enforcement provisions at issue apply not only to discharges of wastewater as in this case, but also to discharges of dredged or fill material, which are subject to the Corps permit program under CWA section 404, 33 U.S.C. § 1344 (1986 and Supp. 1995). Both types of discharges are regulated only when they are to "waters of the United States" (which this Court has held also include wetlands, *see United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)).[5]

EPA has defined "waters of the United States" so broadly as to include any isolated wetland or "other water" with no connection to navigable-in-fact waters. *See* 40 C.F.R. § 122.2 (1994). In fact, EPA asserts and courts have agreed that "waters of the United States" may include isolated areas that are only seasonally or ephemerally wet. *See, e.g., Quivira Mining Co. v. EPA*, 765 F.2d 126 (10th Cir. 1985), *cert. denied,* 474 U.S. 1055 (1986). Rainwater collecting on dry land for a few days may be enough to create a regulated wetland. *See Leslie Salt Co. v. United States*, 700 F. Supp. 476, 487 (N.D. Cal. 1988), *rev'd*, 896 F.2d 354 (9th Cir. 1990) ("*Leslie Salt II*"), *cert. denied*, 498 U.S. 1126 (1991). The term also can encompass man-made impoundments. *See, e.g., Leslie Salt II,* 896 F.2d at 358-60. Moreover,

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5 For additional explanation of the roles of EPA and the Corps, *see* Memorandum of Agreement Between the Dept. of the Army and the Environmental Protection Agency concerning Federal Enforcement for the Section 404 Program of the Clean Water Act, Jan. 19, 1989, *reprinted in* 19 Env. L. Rep. 35183 ("Enforcement Memorandum of Agreement") and *United States v. Mills*, 817 F. Supp. 1546, 1551 (N.D. Fla. 1993), *aff'd*, 36 F.3d 1052 (11th Cir. 1994), *cert. denied*, ___ U.S. ___ (1995).

according to EPA, the only connection to interstate commerce that is required for a "water" to be within its regulatory jurisdiction is that the area is or could potentially be used by migratory birds or endangered species. *See, e.g., Hoffman Homes, Inc. v. EPA,* 999 F.2d 256, 261 (7th Cir. 1993).

Consequently, under this definition, almost any "water" could be determined by EPA to be within its regulatory jurisdiction. Millions of acres of *land*[6] and millions of land owners are potentially subject to EPA's jurisdiction under this regulatory scheme. Moreover, EPA regulates virtually all activities in wetlands and other "waters" that involve any kind of soil movement (even movement of soil on a vehicle's treads).[7]

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6 Under present wetlands determination policy, approximately 111 million acres of land in the United States could be affected as regulated wetlands. *Water Pollution*, 22 Env't Rep. (BNA) 2169, 2194, January 24, 1992. Millions of additional acres of normally dry washes, playas, and other areas are also potentially regulated as "waters of the U.S.," as in *Quivira Mining, supra.* The Corps conducted a study that identified over 8 million isolated depressions of less than one-half acre that could be considered jurisdictional wetlands under the "migratory bird test." U.S. Army Corps of Engineers, *1995 Wetlands Delineation Field Evaluation Forms* (June 1995).

7 The term "discharge" may include dredging an area, grading or road construction, mechanical clearing of land, or even cutting a ditch for the purpose of draining an area. *See* 33 C.F.R. §§ 323.2-323.4 (1994) and, *e.g., Avoyelles Sportman's League, Inc. v. Alexander,* 473 F. Supp. 525 (W.D. La. 1979). *See also* 57 Fed. Reg. 26,894, 26,896 (1992).

Thus, countless land owners are subject, under the decision below, to *ad hoc*, unreviewable EPA determinations that property they own is, despite its appearance and contrary to common sense, really a "water of the United States," and that activities on those lands are therefore subject to federal regulation. Moreover, under the decision below, any of these land owners could, like Laguna Gatuna, make substantial investments in and improvements to their property in reliance on the good faith belief -- or on EPA's own representations -- that an area is not a "water of the United States," only to have EPA subsequently change its position and destroy these expectations, without any reasonable opportunity for judicial review.

II. AVAILABILITY OF JUDICIAL REVIEW IN A SUBSEQUENT ACTION TO RECOVER PENALTIES DOES NOT SATISFY DUE PROCESS

The Tenth Circuit assumed that judicial review of EPA's assertion of Clean Water Act jurisdiction could be had after the EPA imposed an administrative penalty or the United States sought a civil or criminal penalty. The court then concluded this was sufficient to pass constitutional muster. It is unfortunately not clear that a defendant charged with violating an EPA enforcement order will be able to challenge the jurisdictional finding on which the order was based. *See United States v. Mills*, 817 F. Supp. at 1548-49 (refusing to disturb criminal convictions, where Eleventh Circuit had previously affirmed convictions even though criminal defendants were not allowed to put on evidence that the area in question was not a "wetland" at the time of their filling). Even if such a subsequent opportunity for review were clear, however, it would not satisfy the Due Process Clause in light of the severe *and aggravated* penalties that can and often do accompany violation of an EPA or Corps enforcement order.

As noted above, CWA section 309 provides severe civil, criminal, and administrative penalties for discharging to a "water of the United States" without a permit. These penalties are not just theoretical: EPA's wetlands program "places a high priority on enforcement against unpermitted discharges," and there are many examples of EPA civil and criminal enforcement against companies and individuals discharging into areas they did not believe to be "waters of the United States." EPA Enforcement Accomplishments Report FY 1993, April 1994 at 3-17, 3-17-3-19; *see also, e.g., U.S. v. Ellen*, 961 F.2d 462 (4th Cir. 1992), *cert. denied*, ___ U.S. ___ (1992). For example, this Court recently denied a petition for *certiorari* in a case where, although the district court noted "the disturbing implications of the expansive" Corps definition of "waters of the United States," nevertheless a father and son were each sentenced to 21 months incarceration for placing fill material on a lot that "does not have the appearance of what most lay people think of as a 'wetland.'" *Mills*, 817 F. Supp. at 1548.

In addition to these serious penalties, EPA may require companies to restore wetlands following a determination by EPA that a piece of property is a "water of the United States," *see, e.g., United States v. Cumberland Farms of Conn.*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988); and in fact EPA "enforcement efforts . . . generally seek removal of the fill and restoration of the site."[8] Thus, a person who in good faith believes his activity is not regulated under the CWA still faces possible imprisonment and costly

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8 EPA Report to Congress on Clean Water Act Enforcement Mechanisms, pursuant to P.L. 100-4, Section 314(b), May 11, 1990 at 22; *see also United States v. Jones*, No. 5-90-0216 (D. Md. filed May 30, 1990).

restoration requirements if he chooses to challenge EPA's assertion of jurisdiction by violating the compliance order.

In fact, a person who violates a restoration or compliance order to obtain judicial review of an EPA determination subjects himself both to *increased* likelihood of enforcement action and *increased* sanctions for "knowing" violations. As explained by F. Henry Habicht II, former Assistant Attorney General for the Land and Natural Resources Division of the Department of Justice, "EPA seeks cooperation and voluntary compliance; continued violations in the face of repeated notices from EPA are therefore viewed especially seriously. Violations after receipt of notice also help [to] establish the knowledge element of environmental crimes." Habicht, "The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side," 17 Env. L. Rep. 10478, 10481 (December 1987). This policy makes it more likely that a company violating a compliance or restoration order would be prosecuted for the more severe "knowing" violation of the CWA, punishable by imprisonment for up to three years under 33 U.S.C. § 1319(c)(2).[9]

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9 *See, e.g., United States v. Marathon Development Corp.*, 867 F.2d 96 (1st Cir. 1989) (company and senior vice-president convicted for continuing to clear land after receipt of notice from the Army Corps of Engineers that property was regulated wetland); *United States v. Pozsgai*, 31 Env't Rep. Cas. 1230 (E.D. Pa. Jan. 8, 1990), *aff'd*, 897 F.2d 524 (3d Cir. 1990) (Table), *cert. denied*, 498 U.S. 812 (1990) (individual sentenced to three years imprisonment and fined $200,000 for knowingly filling a wetland without a permit after warnings and Corps cease-and-desist order).

The violation of a compliance order will also typically result in *increased* civil or criminal penalties. *See, e.g.*, Federal Sentencing Guidelines §2Q1.3, note 8 (upward departure in a pollution case may be warranted where defendant "has failed to comply with an administrative order"); EPA's "Revised Interim Clean Water Act Settlement Penalty Policy," March 1, 1995, *reprinted in* 25 Env. L. Rep. 35618 (failure to comply with an EPA administrative order is a basis for increasing the gravity component of a civil penalty by up to 150 percent). In fact, it could be argued that violation of such an order represents a separate violation of the CWA, punishable by a penalty of $25,000 per day in addition to the $25,000 per day penalty for the underlying violation of discharging without a permit. *See* CWA § 309(d), 33 U.S.C. § 1319(d).

While the penalties are substantial, there is no "good faith" defense in a civil or criminal prosecution under the CWA, even though the defendant may have had a reasonable belief that his property fell outside CWA jurisdiction. In fact, in most of the reported cases involving criminal prosecution for filling a wetland, the defendant claimed that the particular area in question did not fall within the definition of "waters of the United States." This is exactly the type of situation that this Court found to deprive a person, as a practical matter, of the right to judicial review in *Ex Parte Young*.

III. ORDERS SUCH AS THIS ONE CONSTITUTE BINDING, SUBJECTIVE ADJUDICATIONS OF CLEAN WATER ACT JURISDICTION

Because the definition of "waters of the United States" is fundamentally unclear, and because EPA makes such determinations on a case-by-case basis, companies such as those represented by *amici* have no way of knowing whether their property and their

activities on that property are covered by the Clean Water Act.[10]

Thus, issuance of an administrative order asserting CWA jurisdiction and ordering a property owner to cease activity represents, for that property owner, an adjudication of the often-uncertain question of whether CWA jurisdiction extends to his activities. In this way, an order like the one at issue here differs from an order to cease exceeding discharge permit effluent limitations, for example (or to cease constructing a source of air pollutants without a construction permit). In those cases, there is no question that the federal law applies to the activity, and no case-by-case determinations of jurisdiction are involved.

EPA has even acknowledged that its determinations regarding wetlands and "waters of the United States" are undertaken on a case-by-case and often inconsistent basis. For example, in the preamble to its National Pollutant Discharge Elimination System General Permit and Reporting Requirements for Discharges from Concentrated Animal Feeding Operations, EPA Region VI set out a list of factors to be considered in determining whether certain "playas" are "waters of the United States." 58 Fed. Reg. 7610, 7621 (1993). EPA also stated, however, that the factors "are neither exclusive nor regulatory; they are simply

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10 As noted above, *supra* pp. 7-8, almost any activity can constitute a "discharge," and the term "water of the United States" can mean, in EPA's view, almost any area that is ever wet. At least one court has questioned the constitutionality of imposing penalties where a person of common intelligence could not ascertain that the Clean Water Act "prohibition applies to clean fill dirt placed onto a waterfront lot." *Mills,* 817 F. Supp. at 1554.

examples of the sort of factors EPA will *probably* apply in making individual determinations." *Id.* (emphasis added). EPA adds that "[t]here are various types of commerce which may be affected by the degradation of many playa lakes, but EPA has to date asserted jurisdiction over them only on a case-by-case basis, generally in the context of enforcement actions." *Id.* at 7620.

Similarly, courts have recognized the substantial technical inconsistency associated with wetlands determinations. In *United States v. Ellen*, for example, the court addressed the delineation of "waters of the United States" by EPA and the Corps, and recognized that "[t]he absence of a uniform federal methodology resulted in inconsistent wetlands determinations for similar areas."[11]

Both EPA and the Corps have acknowledged the significant uncertainty accompanying decisions to assert CWA jurisdiction over wetlands.[12] In its 1990 Report

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11 961 F.2d 462, 465 (4th Cir. 1992) (notwithstanding inconsistencies in wetland determinations, defendant convicted of five felony counts for filling wetlands despite Corps' cease and desist order).

12 Since 1987, EPA and the Corps have employed three distinct wetlands delineation manuals for the identification of regulated wetlands. *See, e.g., Ellen,* 961 F.2d at 464-65; Lamunyon, *Wetlands and the Swampbuster Provisions: The Delineation Procedures, Options, and Alternatives for the American Farmer,* 73 Neb. L. Rev. 163, 172-73 (1994). This dispute over the appropriate manual for use in wetlands determinations involves more than mere procedural flip-flopping. Which manual is used to identify and delineate wetlands can make a great difference in the amount of land considered to be wetlands. Lamunyon, *supra,* 73 Neb. L. Rev. at 173-74; National Research Council, *Wetlands:*

to Congress, *supra* n. 8, EPA stated that: "The agencies' differing interpretations of issues related to the geographic jurisdiction of section 404 or whether a particular activity is regulated or has been authorized, have hampered section 404 enforcement." *Id.* at 20; *see also* 58 Fed. Reg. 4995 (1993); 56 Fed. Reg. 40,446, 40,449 (1991). Congress also has recently observed that "EPA has not consistently applied the regulatory definition of navigable waters, creating uncertainty for the regulated community." House Comm. on Transp. and Infrastructure, H.R. Rep. No. 112, 104th Cong., 1st Sess. 147 (1995).

Because of the vague and confusing criteria for determining whether CWA prohibitions apply to a given activity, and the government's application of those criteria on a case-by-case basis, a compliance order issued under CWA section 309(a), 33 U.S.C. § 1319(a) (1986), is more than simply an order to cease violating the law. It includes, both implicitly and explicitly, an agency determination that the particular facts of that case bring the activity within CWA jurisdiction.[13] Recognizing this, on January 19, 1989, EPA and the Corps entered into a "Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the

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Characteristics and Boundaries (1995) at 77-78 ("NRC Report").

13 *See, e.g., Leslie Salt II,* 896 F.2d at 360 (even where the Corps has created an exemption from its wetlands jurisdiction for certain "waters," "those waters are subject to such jurisdiction on a 'case-by-case' basis of review"); *United States v. Torres,* 656 F. Supp. 251, 254 (D.P.R. 1987), *aff'd,* 826 F.2d 151 (1st Cir. 1987) ("the Corps usually works on a case-by-case basis in determining whether a certain area is a wetland").

Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act" (*reprinted in* 19 Env. L. Rep. 35181). That document not only acknowledges that an agency determination of jurisdiction is a necessary part of any enforcement action; it also recognizes that such a jurisdictional decision is a final, binding agency action: "Case-specific determinations made pursuant to the terms of this [Memorandum of Agreement] will be binding on the Government and represent the Government's position in any subsequent Federal action or litigation regarding the case." *Id. See also* 33 C.F.R. § 320.1(a)(6) (1994) (authorizing Corps district engineers to issue "formal determinations concerning the applicability of the Clean Water Act" which "shall constitute a Corps final agency action"). In light of the binding nature and serious consequences of jurisdictional determinations, the Tenth Circuit was unwarranted in concluding, without any real analysis, that the adjudications of Clean Water Act jurisdiction provided for in these governmental procedures are exempt from review despite the strong presumption of reviewability of federal agency actions under *Abbott Lab. v. Gardner*, 387 U.S. 136, 140-41 (1967).

IV. THE STATUTORY ANALYSIS ADOPTED BY THE TENTH CIRCUIT RESTS ON AN UNWARRANTED INTERPRETATION OF JUDICIAL REVIEW UNDER ENVIRONMENTAL LAWS AND IS INCONSISTENT WITH A DECISION OF THE EIGHTH CIRCUIT

Laguna Gatuna's petition for *certiorari* showed how inappropriate it was for the Tenth Circuit to infer congressional intent to shield CWA enforcement orders from judicial review. Laguna Gatuna could have gone further, however, to show that the cases relied on by the Tenth Circuit are based on faulty analogies. The Tenth

Circuit relies on a decision from the Court of Appeals for the Fourth Circuit, *Southern Pines Assocs. v. United States*, 912 F.2d 713 (4th Cir. 1990).[14] The *Southern Pines* court in turn based its conclusion in part on cases examining "pre-enforcement" review in the context of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and the Clean Air Act ("CAA"). *Id.* at 716. Reliance on this approach, however, is inappropriate for several reasons.[15]

Most importantly, at least one court has questioned whether EPA orders under CERCLA would be constitutional if there were not a meaningful

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14 The Tenth Circuit also relied upon a another decision following *Southern Pines Assocs., Rueth v. EPA.* Additionally, the court relied on *Southern Ohio Coal Co. v. Office of Surface Mining,* 20 F.3d 1418 (6th Cir. 1994), *cert. denied,* ___ U.S. ___ (1994). That case is distinguishable from the instant case insofar as EPA had only threatened to issue a compliance order and had not yet done so. Moreover, that case involved discharges to the Ohio River, clearly a "water of the United States," and consequently did not involve a challenge to EPA's jurisdictional determination of whether or not a "water of the United States" was involved.

15 CERCLA was enacted in 1980, eight years after the relevant provisions of the Clean Water Act. CERCLA is therefore hardly an indication of inferred congressional intent in the Clean Water Act. In addition, although CERCLA initially did not affirmatively grant or deny judicial review of pre-enforcement clean-up orders, Congress subsequently amended CERCLA in 1986 to include a provision which *specifically precludes* federal review of pre-enforcement remedial actions. 42 U.S.C. § 9613(h) (1995).

opportunity to challenge such orders without penalty. *Solid State Circuits v. EPA,* 812 F.2d 383 (8th Cir. 1987). The *Solid State Circuits* court addressed the constitutionality of treble damages for non-compliance with EPA clean-up orders under CERCLA. Specifically, the Eighth Circuit held that CERCLA's clean-up order scheme may pass constitutional muster if it "may be interpreted so that no penalty is imposed if the challenging party has reasonable grounds to contest the *validity or applicability* of an administrative order." *Id.* at 390 (emphasis added). The court concluded that, because CERCLA provides an exemption from treble damages for parties bringing good-faith challenges to remediation orders, the CERCLA scheme satisfied the minimum elements of due process. *Id.* at 391. In other words, the court found the CERCLA treble damage provision constitutional because it allows an individual to violate a pre-enforcement order without the threat of treble damages, in the good-faith belief that the order is improper, in order to obtain judicial review of the administrative action.

If this standard were applied to the Clean Water Act, as interpreted by the Tenth Circuit, the Clean Water Act would fail: a company violating a cease and desist order to obtain judicial review, *even in the good-faith belief that its property is not subject to Clean Water Act jurisdiction,* is entirely subject to the full range of grave criminal and civil penalties available under the statute. The CERCLA analogy relied on by the Tenth Circuit therefore not only is inapposite, but actually cuts against the unreviewable deprivation of property rights allowed in the decision below.

Finally, CERCLA Section 106 does not contain the threat of a criminal penalty, in contrast to the Clean Water Act. If the treble damages hinging on non-compliance with the CERCLA pre-enforcement order in *Solid State Circuits* were sufficient to trigger the need for a good-faith exemption to preserve constitutionality,

then certainly the criminal sanctions available for non-compliance with enforcement orders under the CWA demand due process at the time of the orders' issuance.[16]

CONCLUSION

Because EPA's definition of "waters of the United States" is so broad and so vague that it could apply to virtually any property, the Tenth Circuit's decision has the potential to affect millions of acres of property and millions of landowners. This court's intercession is needed to guarantee that private property owners such as *amici* can obtain judicial review of EPA's case-by-case determinations of their rights, without having to risk severe criminal and civil liability. The fact that disobeying an EPA order increases the likely size of penalties and the likelihood of criminal prosecution, coupled with the lack of a good-faith defense for landowners, renders post-enforcement review of these assertions of federal jurisdiction unavailable as a practical matter.

Far from interfering with the government's effective enforcement of the CWA, as claimed by the

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16 Both the Fourth Circuit and the Tenth Circuit also inappropriately rely on provisions of the Clean Air Act in holding that the Clean Water Act precludes judicial review in this instance. A compliance order under the Clean Air Act does not involve the same case-by-case factual determination of jurisdiction as is the case under the Clean Water Act for discharges to a "water of the United States." No subjective determination of jurisdiction by EPA is required to initiate enforcement action under the Clean Air Act, which may be based on violation of specific regulatory provisions or construction of defined sources of air pollution. *See, e.g.*, 42 U.S.C. § 7413(c)(1) (1995).

Tenth Circuit, providing for judicial review of jurisdictional determinations would probably enhance compliance. In those cases where there is a genuine controversy about CWA jurisdiction, EPA or the Corps would simply have to justify their final, "binding" determinations earlier in the process, when a compliance order is challenged; in most cases, though, enforcement orders would still be complied with summarily, as they are now. In fact, the availability of judicial review would likely reduce the admitted inconsistencies in jurisdictional determinations and improve public confidence in the system, resulting in higher levels of compliance. As the National Research Council recently observed in discussing jurisdictional determinations under the CWA, "Citizens lose faith in a legal system that is administered inconsistently even as it imposes penalties for noncompliance." *NRC Report, supra* n. 12, at 185.

Respectfully submitted,

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(H)

No. 95-465

In The

Supreme Court of the United States

October Term, 1995

LAGUNA GATUNA, INC., A New Mexico Corporation,

Petitioner,

v.

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, JANE N. SAGINAW, Regional Administrator, Region VI of the Environmental Protection Agency, and the ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO OPPOSITION

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ARGUMENT

I. DEFENDANTS ADMIT THAT THIS COURT SHOULD GRANT CERTIORARI GIVEN THE DENIAL OF DUE PROCESS IN THIS CASE IN WHICH ALL ACCESS TO THE COURTS HAS BEEN FORECLOSED.

Defendants admit that "[t]he absence of judicial review may offend due process in extreme cases where 'the practical effect of coercive penalties is to foreclose all access to the courts.' "[1] This case is the very case of which Defendants write. This is that "extreme case[] where the practical effect of coercive penalties is to foreclose all access to the courts."

Petitioner was given a cease and desist order by Defendants. The violation of that order – and according to the courts below a violation of the order is the only manner in which Petitioner can obtain judicial review of the order – would subject Petitioner to a $25,000 a day fine and jail time.[2] Petitioner cannot afford to expose itself to such coercive penalties to obtain judicial review. As a result, Petitioner's access to the courts has been foreclosed.

Defendants cannot have it both ways. Defendants cannot assert, as a philosophical matter, that "[t]he absence of judicial review may offend due process in extreme cases where 'the practical effect of coercive penalties is to foreclose all access to the courts,' " but then

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[1] Respondents' Brief at 15, citing *Thunder Basin Coal Company v. Reich*, 510 U.S. ___, 114 S.Ct. 771, 782 (1994).

[2] 33 U.S.C. §1319(c)(1).

when confronted with just such a case, pretend that it does not exist. Applying the standard embraced by Defendants, this Court should grant certiorari.

II. DEFENDANTS' ASSERTION THAT THE ENVIRONMENTAL PROTECTION AGENCY'S CEASE AND DESIST ORDER IMPOSES NO PENALTY OR SANCTION AND DOES NOTHING TO ALTER THE LEGAL POSITION OF PETITIONER IS SIMPLY UNTRUE.

Defendants' assertion that the Environmental Protection Agency's (EPA) issuance of a cease and desist order against Petitioner carries with it no sanctions and does nothing to change Petitioner's legal position is not only untrue, but is an audacious and arrogant misrepresentation of the facts below and the situation in which Petitioner finds itself.[3]

On January 19, 1989, the EPA and the United States Army Corps of Engineers entered into a "Memorandum of Agreement [MOA] Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 program and the Application of the

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[3] [T]he compliance order is not self enforcing. It imposes no penalty or other sanction. The issuance of such a compliance order does nothing to alter the legal position of the alleged violator. . . . In effect, the compliance order merely apprises the alleged violator of the agency's pre-enforcement position. Its issuance is by no means a final administrative determination that a violation has occurred.

Respondents' Brief at 13-14.

Exemptions Under Section 404 (f) of the Clean Water Act."[4] The MOA specifically states: "[c]ase-specific determinations made pursuant to the terms of this [MOA] will be binding on the Government and [will] represent the Government's position in any subsequent Federal action or litigation regarding the case."[5] Thus, contrary to Defendants' assertion, a determination by the EPA that an area constitutes "waters of the United States," such as the one made regarding Petitioner's land, is final agency action.

Not only does issuance of a compliance order that an area is "waters of the United States" constitute final agency action, it "alter[s]" in a very significant way "the legal position of" Petitioner. If Petitioner had violated the cease and desist order issued by EPA, then Petitioner would have been subject to civil penalties of up to $25,000 per day, criminal penalties of up to $25,000 per day plus one year in prison, as well as administrative penalties of $125,000 per violation.[6] In addition, since any violation by Petitioner, in order to gain access to court, would have been "knowing," the penalty would have increased to $50,000 per day and up to three years in jail.[7] In other words, "the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate [Petitioner] and its officers from resorting to

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[4] Reprinted in 19 Env. L. Rep. 35181.

[5] *Id.*

[6] 33 U.S.C. §1319(c)(1), (d) & (g).

[7] 33 U.S.C. §1319(c)(2). This represents double the fine and a three fold increase in jail time.

the courts."[8] Is Petitioner's fear of such monstrous penalties a reasonable one? The answer is: "Yes!" When asked by the Court of Appeals what penalties Defendants would seek should Petitioner violate the cease and desist order to obtain judicial review, Defendants' attorney responded: "We would seek the *maximum*."[9]

Under the cease and desist order issued by EPA, Petitioner is faced with "an abandonment of the right" to judicial relief "rather than face the conditions upon which [the right to judicial review] is offered or may be obtained."[10] When Defendants assert otherwise they attempt to mislead this Court.

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[8] *Ex Parte Young*, 209 U.S. 123, 147 (1908). The assessment of penalties for a violation of a compliance order is not only a possibility, but is a probability. *See* the excellent discussion of this issue by *Amici* at pages 9-12 of their brief: not only is the penalty increased, but also the probability of prosecution is significantly increased if a compliance order is violated ("EPA seeks cooperation and voluntary compliance . . . . Violations after receipt of notice also help *establish the knowledge element of environmental crimes*") *Id.* at 11 (Emphasis added); (EPA "places a high priority on enforcement of unpermitted discharges") *Id.* at 10 (Emphasis added); "EPA may require companies to restore wetlands following a determination, thus a person . . . faces . . . costly restoration requirements if he chooses to challenge EPA's assertion of jurisdiction by violating the compliance order" *Id.* at 10-11; and "violation of a compliance order will also typically result in increased civil or criminal penalties." *Id.* at 12.

[9] A similar statement was made by EPA officials to Petitioner during the meeting in the spring of 1991. Petitioner requested that EPA issue a *de minimis* fine so Petitioner could challenge EPA's jurisdiction. EPA refused to issue a *de minimis* fine and told Petitioner if the cease and desist order was violated EPA would seek the maximum penalties allowed by law.

[10] *Ex Parte Young*, 209 U.S. at 147.

III. DEFENDANTS REFER THIS COURT TO THE WRONG LEGISLATIVE HISTORY AND ONE INAPPLICABLE TO THE CASE AT BAR.

While admitting that in determining whether a particular statute precludes judicial review the proper reference is to the statute itself,[11] Defendants draw the attention of this Court, not to the legislative history of the Clean Water Act (CWA), that is the statute in question here, but to the Clean Air Act (CAA) – an act that has no application to the case at bar.[12] The question before this Court, given the importance of the right of judicial review and the seriousness of its denial,[13] is whether Congress intended to deny that right in its adoption of the CWA. Defendants' attempt to analogize to the CAA is without merit and should be ignored.

IV. DEFENDANTS' ATTEMPT TO CONVINCE THIS COURT THAT THE CLEAN AIR ACT IS THE SAME AS THE CLEAN WATER ACT FAILS.

Defendants attempt to persuade this Court that the legislative history of the CAA, which precludes judicial

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[11] "Whether a particular statute (here, the CWA) 'is intended to preclude initial judicial review is determined from *the statute's* language. . . . ' " Respondents' Brief at 8. (Emphasis added.)

[12] Respondents' Brief at 11.

[13] The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. *The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.*

Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967). (Emphasis added.)

review, is the same as the legislative history of the CWA, which is silent regarding judicial review. Yet the enforcement regimes of the two acts could not be more different and thus any attempt to analogize between the two must be resisted.

The CAA contains express and published standards against which conduct is measured. The amount of emissions permitted under the CAA is clear, as is what constitutes a violation of the CAA. As pointed out by *Amici*, the CAA has exact emission standards that are to be applied consistently.[14] Under the CAA, when emissions exceed a certain level, a violation of the law has occurred. A person charged with a violation will know that a violation has occurred.[15] However, with regard to the so-called "waters of the United States" provision of the CWA, there are no published standards. Instead, the decision as to what constitutes "waters of the United States," that is, what, for example, is a "wetland," is established on a case-by-case basis.

Defendants admit that they undertake determinations regarding "waters of the United States" "on a case-by-case basis, generally in the context of enforcement actions."[16] These case-by-case determinations are made against a standard that is clearly subjective, and that may or may not be applied: "[these factors] are neither exclusive nor regulatory; they are simply examples of the sort

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[14] Brief of *Amici* at 13.

[15] *Id.*

[16] Preamble to the National Pollutant Discharge Elimination System General Permit and Reporting Requirements from Concentrated Animal Feeding Operations, 58 Fed. Reg. 7620.

of factors EPA will *probably* apply in making individual determinat ns."[17] The result of this "absence of a uniform federal methodology" results "in inconsistent wetlands determinations for similar areas."[18] As *Amici* declare, "[t]h[e] dispute over the appropriate manual for use in wetlands determinations involves more than mere procedural flip-flopping. Which manual is used to identify and delineate wetlands can make a great difference in the amount of land considered to be wetlands."[19] Most importantly, for constitutional due process to be assured, a federal statute must provide a person with a clear standard against which his or her conduct can be measured.[20] Contrary to the assertion by Defendants, the

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[17] *Id.* (Emphasis added.)

[18] *United States v. Ellen*, 961 F.2d 462, 465 (4th Cir. 1992).

[19] Brief of *Amici* at 14, n. 12, citing National Research Council, *Wetlands: Characteristics and Boundaries* (1995) at 77-78 and Justin Lamunyon, *Wetlands and the Swampbuster Provisions: The Delineation Procedures, Options, and Alternatives for the American Farmer*, 73 Neb.L.Rev. 163, 173-174.

[20] It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. . . . we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. . . . if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters. . . .

Grayned v. City of Rockford, 408 U.S. 104, 107 (1972). This Court has applied this standard to civil matters. *See Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498 (1982). The civil standard is described as "less strict" because "the regulated

CWA fails to provide that constitutionally required standard. While the CWA may not be void for vagueness on its face, if Defendants are correct that no judicial review is allowed in the face of a determination that private property is "waters of the United States," then the CWA is unconstitutional as applied. Defendants' attempt to analogize to the CAA to save the CWA from its constitutional infirmity are nonavailing.

CONCLUSION

Defendants' Opposition must be found wanting, not only for its failure to provide this Court with the relevant legislative history, but for its failure to set forth accurately the legal impact of the cease and desist order issued by the EPA. While admitting that "[t]he absence of judicial review may offend due process in extreme cases

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enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." *Id.* Petitioner was denied either opportunity in the case at bar. Petitioner asked EPA if the sinkhole was "waters of the United States" and EPA said it was not. App. at 13. EPA then changed its position and declared the sinkhole "waters of the United States." App. at 13-14. This does nothing to "clarify the meaning of the regulation." It adds confusion. The reason this case is before this Court is because there is no administrative process that provides the necessary "meaningful review." There is no due process. The decision of the Tenth Circuit is in conflict with the holding of this Court since the decision below "encourage[s] arbitrary and discriminatory enforcement. . . . [and] allows [regulators] to pursue their personal predilections" contrary to the decisions of this Court. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

where 'the practical effect of coercive penalties is to foreclose all access to the courts,' " Defendants attempt to pretend that this case is not one of those "extreme cases." Yet, despite Defendants' obfuscation and misrepresentations, it clearly is. Certiorari should be granted.

Respectfully Submitted,

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